Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CURR-SPEC PARTNERS, L.P., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has long required that all federal courts recognize the inherent limited nature of their own subject matter jurisdiction. To further that end, the Court has required the lower courts, including the Tax Court, to constantly examine their jurisdiction and, whenever jurisdiction is questioned, to presume its absence and require the party invoking it to carry the burden of proof. In the instant case, the Tax Court ignored the narrow jurisdictional constraints on its authority to adjudicate matters relating to the return filed by a partnership. In particular, Congress has directed that the Tax Court's authority to hear and resolve matters concerning a partnership is limited to the partnership and its return. The Tax Court, however, ignored this restriction and looked to the tax return of the individual partners in order to avoid the limitations bar that would otherwise apply to the proceeding against the partnership. In affirming, the Fifth Circuit sharpened and expanded its conflict among the circuits.

When a Federal court sidesteps its obligations in the face of a challenge to its jurisdiction, or by judicial interpretation expands its subject matter jurisdiction, this Court obligates the Court of Appeals to enforce this Court's rules for limiting jurisdiction. This occurs either by making its own determination or by mandating that the court below address the challenge. The Tax Court below (a) failed to determine whether it had the subject matter jurisdiction to decide a matter concerning a statute of limitation, (b) failed to impose the burden of proof on the party seeking the exercise of jurisdiction in its favor on that matter, and (c) failed to determine the

effect of jurisdiction in its judicial interpretation of a statute of limitation.

Two questions are presented:

1. Whether the Fifth Circuit erred in affirming the Tax Court's interpretation of a statute of limitation resulting in judicial expansion of its jurisdiction beyond the scope set by Congress.

2. Whether the D.C. and Federal Circuit Courts, and now the Fifth Circuit, erred by (a) failing to consider subject matter jurisdiction in their interpretation of a non-jurisdictional statute, resulting in judicial expansion of jurisdiction, and (b) dividing from seven other Circuits that interpreted the same statute based on limited subject matter jurisdiction.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Curr-Spec Partners, L.P. v. Commissioner of Internal Revenue*, 579 F.3d 391 (5th Cir. 2009). The Fifth Circuit affirmed the September 24, 2007 decision of the United States Tax Court reported at *Curr-Spec Partners, LP, Curr-Spec Managers, LLC, Tax Matters Partner v. Commissioner of Internal Revenue*, T.C. Memo. 2007-289 (2007).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Art. I, § 8

> The Congress shall have power...to constitute tribunals inferior to the Supreme Court...

United States Constitution, Art. III, § 2

> The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States...

Internal Revenue Code, 28 U.S.C. § 6226(f):

> (f) Scope of judicial review
>
> A court with which a petition is filed in accordance with this section shall have jurisdiction to determine all partnership items of the

> partnership for the partnership taxable year to which the notice of final partnership administrative adjustment relates, the proper allocation of such items among the partners, and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item.

Internal Revenue Code, 28 U.S.C. § 6231(a)(3) and (4):

> (3) Partnership item
>
> The term "partnership item" means, with respect to a partnership, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level.
>
> (4) Nonpartnership item
>
> The term "nonpartnership item" means an item which is (or is treated as) not a partnership item.

STATEMENT

This case is governed by the unified partnership audit and litigation procedures established by the Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, 96 Stat. 324, 648-671 ("TEFRA"). The TEFRA unified partnership procedures require a special proceeding, focused solely on a partnership's tax return and those legal and factual matters related to the partnership as a whole, distinct, independent, and wholly

segregated from all legal and factual matters related to any individual partner. The relevant statute, 26 U.S.C. 6226(f), empowers a court hearing a partnership case to hear and decide only those partnership items for the tax year relating to an FPAA (a "notice of final partnership administrative adjustment" which the Commissioner issues to change a partnership return). As described succinctly by the Eleventh Circuit:

> TEFRA created, *inter alia*, a new scheme for partnerships, pursuant to which partnership items would no longer be audited partner-by-partner. Rather, under TEFRA, all common partnership items are evaluated in one uniform proceeding to determine those items applicable to all partners. Thereafter, individual partner-level proceedings are held as to items unique to the partners. [1]

No legal or factual matter unique to an individual partner may be heard in a TEFRA partnership case because litigation of individual partner facts and legal issues occurs in later separate, individual partner cases.[2] Similarly, in those later, separate, individual partner cases, TEFRA jurisdictionally bars the trial court from deciding any matter related to the partnership tax return as changed by the FPAA. These mutually exclusive limits on subject matter jurisdiction keep the trial courts focused as Congress intended.

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1 *Rose v. Comm'r.*, 07-12245, 11 n. 9 (11th Cir. 4-24-2008)(unpublished).

2 *See Callaway v. Comm'r.*, 231 F.3d 106, 108 and 117 (2d Cir. 2000) (finding that TEFRA's centralized proceedings do not apply to treatment of nonpartnership items).

In the Tax Court below, Curr-Spec brought an action for judicial review under § 6226 of the TEFRA Unified Partnership Procedures in response to the government's FPAA purporting to change its 1999 partnership tax return. Curr-Spec pled the bar of the statute of limitations because the government issued its FPAA more than three years after the 1999 tax return filing date. The Commissioner answered by pleading that the Tax Court should rely instead on the filing dates of the individual partner returns and decide the FPAA limitations under nonpartnership statute of limitations of § 6501 (a). Curr-Spec moved to dismiss such allegations for lack of jurisdiction but the Tax Court denied petitioner's plea to jurisdiction. Notably, the Tax Court did not require the government to establish the jurisdictional basis supporting its attempt to rely on the individual partner's statute of limitations, notwithstanding the terms of TEFRA.

The Fifth Circuit affirmed and denied Curr-Spec's motion for rehearing *en banc* on October 15, 2009.

REASONS FOR GRANTING THE PETITION

I. Review is Warranted to Restrain Improper Judicial Expansion of Federal Court Subject Matter Jurisdiction in the Interpretation of a Statute of Limitation.

Federal courts are courts of limited jurisdiction; they possess only that power authorized by the Constitution and by Congress.[3] This Court frequently

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3 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1984); *see also Willy v. Coastal Corp.*, 503 U.S. 131, 136-137 (1992); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986).

writes[4]:

> As we have repeatedly said: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction. . . ." *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).

This Court guards against expansion by judicial interpretation by presuming all matters lie outside this limited jurisdiction[5] and by imposing the burden of establishing the contrary on the party asserting jurisdiction.[6] The Tax Court, a special Article I court, exercises Article III judicial power in the same way, with subject matter jurisdiction limited by Congress, as the federal district courts exercise theirs.[7]

Congress enacted the unified partnership audit and litigation procedures, 26 U.S.C. § 6221, *et. seq.*, and created a two-step procedure that begins with a partnership only case limited solely to partnership items, the result of which binds all partners. Thereafter,

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4 *Rasul v. Bush*, 542 U.S. 466, 489 (2004).

5 *Id.*; *see also Turner v. Bank of North-America*, 4 Dall. 8, 11 (1799).

6 *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936).

7 *Freytag v. Commissioner*, 501 U.S. 868, 890-891 (1991); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-851 (1986).

Congress called for separate proceedings involving individual partners—limited to nonpartnership items and barring consideration of the previously determined partnership items. The relevant jurisdictional provision for a step-one partnership case is 26 U.S.C. 6226(f), which limits the scope of jurisdiction for such a partnership case to those legal and factual matters related to the partnership *qua* partnership:

> (f) Scope of judicial review
>
> A court with which a petition is filed in accordance with this section shall have jurisdiction to determine all partnership items of the partnership for the partnership taxable year to which the notice of final partnership administrative adjustment relates, the proper allocation of such items among the partners, and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item.

TEFRA defines a "partnership item" in 26 U.S.C. § 6231 (a)(3):

> The term "partnership item" means, with respect to a partnership, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for the purposes of [subtitle F], such item is more appropriately determined at the partnership level than at the partner level.

Conversely, TEFRA defines a "nonpartnership" item in 26 U.S.C. § 6231 (a)(4) as any item that is not a partnership item. As noted by the Second Circuit[8], the distinction governs jurisdiction which "turns on the classification, for the purposes of subtitle F, of the items to which the tax deficiencies were attributable. If those items were classified as partnership items, subchapter C [the TEFRA partnership procedures] would apply. *See* I.R.C. §§ 6221, 6211(c), 6216 (4). If those items were classified as nonpartnership items, then subchapter C *could* not apply. *See, e.g.*, I.R.C. § 6226 (f); *Maxwell*, 87 T.C. at 788." *Id.* at 117. (*emphasis in original*)

The Fifth Circuit decided *Weiner v. U.S.*[9], the seminal authority establishing the standard by which TEFRA trial courts determine whether a matter is a partnership item or not. The *Weiner* opinion requires that a decision about the FPAA statute of limitations, which it decided is a partnership matter, may be decided solely in a step-one partnership-only case "because the FPAA limitations issue affects the partnership as a whole, it should not be litigated in an individual partner proceeding, as such a result would contravene the purposes of TEFRA."[10] Concerning the substantive FPAA limitations issue, the Fifth Circuit held that "the FPAA statute of limitations determination challenged in this case *deals with facts specific to the partnership.* The

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8 *Callaway v. Comm'r.*, 231 F.3d 106 (2nd Cir. 2000).

9 *Weiner v. U.S.*, 389 F.3d 152 (5th Cir. 2004).

10 *Id.* at 156-7.

court need not consider...an individual's communications with the IRS."[11]

Because individual partner statutes of limitations under § 6501 (a) are legal issues solely concerning individual partners based on individual partner filing dates, and do not affect the partnership as a whole, TEFRA jurisdiction flowing from § 6226(f) bars them from being litigated in Curr-Spec's partnership-level case below. However, Curr-Spec brought a TEFRA step-one partnership case in the Tax Court under 26 U.S.C. § 6226 claiming that the Commissioner issued its FPAA purporting to change Curr-Spec's 1999 partnership tax return beyond the three-year period of 26 U.S.C. § 6229 from the return filing date. The Commissioner answered that the FPAA was timely pursuant to § 6501 (a) because it issued within three years of the filing of 2000 and 2001 year tax returns *of an individual partner.* Curr-Spec moved to strike, for lack of jurisdiction, the Commissioner's § 6501 (a) allegations about individual partner tax return filing dates. The Tax court denied the motion.

The Tax Court theorized that if Curr-Spec were correct it could not apply its precedent in *Rhone-Poulenc Surfactants & Specialties, L.P. v. Comm'r,*[12] that purports to interpret the relationship between § 6229 as the TEFRA statute of limitations and § 6501 (a), the general limitations under the Internal Revenue Code.[13] However,

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11 *Id.* at 157 (*emphasis added*).

12 *Rhone-Poulenc Surfactants & Specialties, L.P. v. Comm'r,* 114 T.C. 533 (2000), *appeal dismissed and remanded,* 249 F.3d 175 (3d Cir. 2001).

13 *Curr-Spec v. Comm'r,* T.C. Memo 2007-289 at 9 n.4.

Rhone-Poulenc did not consider or address the antecedent question of whether the Tax Court must first address whether the individual partner statute of limitations would be within the Tax Court's competence given the jurisdictional restrictions of § 6226(f). Accordingly, it gave no force to this Court's presumption against subject matter jurisdiction and, quite to the contrary, simply assumed its jurisdiction—in the face of a statute and statutory scheme intentionally drawn by Congress to narrow the Tax Court's power to issues concerning the partnership as distinct from its constituent partners.

The Fifth Circuit affirmed. Rather than determine whether the Tax Court possessed the jurisdiction in a TEFRA step-one partnership case to decide a strictly partnership issue based on facts unique to any partner, the Court below erred by re-examining the *Rhone-Poulenc* holding and affirming both that case and the Tax Court's decision in this case below. It committed this error by failing to determine whether § 6501 (a) limitations could, in any way, be a partnership item under § 6231 (a)(3) as the prerequisite for jurisdiction. Instead, the Circuit Court below merely saw Curr-Spec's jurisdictional challenge as a novel attack on *Rhone-Poulenc* rather than as a plea to the Tax Court's jurisdiction. It ultimately erred by failing to follow the law of this Court, which as early as 1799 established a presumption against jurisdiction[14] and imposes the burden on the proponent of expanding jurisdiction.[15]

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14 *Kokkonen*, 511 U.S. at 377 citing *Turner v. Bank of North-America*, 4 Dall. 8, 11 (1799).

15 *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178,

Because Curr-Spec's appeal to the Fifth Circuit focused on the Tax Court's lack of jurisdiction, the Fifth Circuit ruled that the Tax Court had jurisdiction based on § 6226(d)(1) which provides that every partner

> shall be permitted to participate in [partnership-level litigation] solely for the purpose of asserting that the period of limitations for assessing any tax attributable to partnership items has expired *with respect to such person*, and the court having jurisdiction of such action shall have jurisdiction to consider such assertion.[16]

The Circuit Court below erred by disregarding the fact that no partner made such an appearance and therefore the jurisdiction granted by 26 U.S.C § 6226 (d)(1) was never invoked.

The Fifth Circuit erred by deferring to, and affirming, the Tax Court's decision that the FPAA statute of limitations, clearly a partnership item, could be decided based on the nonpartnership limitations under § 6501 (a) using facts unique to individual partners. This Court, by contrast, holds that special Article I courts, such as the Tax Court, have "no special expertise in interpreting their authorizing statutes if an issue can be characterized as jurisdictional, see *Schor, supra*, at 845,"[17] By refusing to substantively consider Curr-Spec's

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182-183 (1936).

16 *Curr-Spec Partners*, 579 F.3d at 395-96 (*emphasis in the original*).

17 *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring, citing *CFTC v. Schor*, 478 U.S. 833, 844 (1986)).

jurisdictional challenge, the Tax Court erred by "interpolat[ing] into a statute limiting the jurisdiction of a court, the qualification that such limitation does not apply when the Government invokes the jurisdiction."[18]

The Fifth Circuit's error, in deferring to the Tax Court's judicial expansion of its jurisdiction, divided it from every other Circuit Court interpreting the FPAA limitations based, limited jurisdiction in TEFRA cases, merits this Court's review.

II. Review is Warranted to Resolve a Lopsided Split Between the Seven Circuits interpreting the Statute of Limitations based on Subject Matter Jurisdiction and the Three Circuits that Ignore Jurisdiction.

The Fifth Circuit below wrote, that by interpreting § 6229 as they did they were following *Rhone-Poulenc* and two Circuit Courts:[19] the D.C. Circuit's opinion in *Andantech L.L.C. v. Commissioner*[20] and the Federal Circuit's opinion in *AD Global Fund, LLC v. United States*.[21] As additional justification, the Fifth Circuit wanted to avoid creating a split with these other Circuit Courts ("We are always chary to create a circuit split.")[22] However, the Court of Federal Claims in *AD Global Fund* acknowledged a recent split from the

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18 *United States v. Mine Workers*, 330 U.S. 258, 314 (1947).

19 *See Curr-Spec Partners*, 579 F.3d at 396-7.

20 *Andantech L.L.C. v. Comm'r*, 331 F.3d 972 (D.C. Cir. 2003).

21 *AD Global Fund, LLC v. United States*, 481 F.3d 1351 (Fed. Cir. 2007).

22 *Curr-Spec Partners*, 579 F.3d at 399 n. 37.

broad authority already in existence concerning whether partnership limitations are partnership items to be decided by reference to the partnership and not its partners, well before the Federal Circuit affirmed its decision:

> While this court agrees with defendant that the most recent court decisions were in defendant's favor, the circuits have split regarding the proper interpretation of section 6229(a). *Compare Weiner v. United States*, 389 F.3d 152 (5th Cir. 2004) (viewing section 6229(a) as separate statute of limitations), and *Callaway v. Comm'r*, 231 F.3d 106 (2d Cir. 2000) (same), with *Andantech, L.L.C. v. Comm'r*, 331 F.3d 972 (D.C. Cir. 2003) (holding that section 6229(a) operates as extension of time rather than separate statute of limitations).[23]

On one side of this argument, most Circuit Courts correctly limit the jurisdiction of a trial court, when faced with a TEFRA partnership statute of limitations challenge, to legal and factual issues related to the subject partnership: The First Circuit in *CC&F W. Operations Ltd. Pship. v. Commissioner*;[24] the Second Circuit in a series of opinions; [25] the Fifth Circuit in *Weiner* prior to

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23 *AD Global Fund, LLC v. United States*, 67 Fed. Cl. 657, 660 (2005), *aff'd*, 481 F.3d 1351 (Fed. Cir. 2007).

24 *CC&F W. Operations Ltd. Pship. v. Commissioner*, 273 F.3d 402, 405 (1st Cir. 2001) (deciding the case based on Sec. 6229 as the sole statute of limitations for assessment of tax from partnership items).

25 *Chimblo v. Comm'r*, 177 F.3d 119, 125 (2d Cir. 1999)("under TEFRA, a statute of limitations defense concerns a 'partnership item,' see IRC § 6231 (a)(3)"); *Callaway v. Commissioner*, 231 F.3d 106 (2d Cir. 2000)(discussed at length *infra*); *Madison Recycling*

this case, discussed at length *infra*, and other Fifth Circuit cases;[26] the Sixth Circuit;[27] the Seventh Circuit in *Kaplan v. U.S.*;[28] the Ninth Circuit in *Monetary II Ltd. Pship. v. Commissioner*;[29] and the Eleventh Circuit in *Davenport Recycling Assocs. v. Comm'r* and in *Monahan v. Comm'r*.[30] As late as November 2009 and on notice of the jurisdictional defect in its *Rhone-Poulenc* decision,

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Associates v. Commissioner, 295 F.3d 280 (2d Cir. 2002)(construing IRC § 6229 as the sole statute of limitations for partnership items and IRC § 6229(a) solely by reference to the partnership return filing: "In this case, absent extensions, any FPAA for Madison's 1982 taxable year should have been issued by April 15, 1986.")

26 *Weiner v. U.S.*, 389 F.3d 152 (5th Cir. 2004).

27 *Williams v. United States*, 165 F.3d 30 (6th Cir. 1998) (Table) 1998 WL 537579, at *3 ("It is well established that [FPPA] statute of limitations challenges are considered to a partnership item").

28 *Kaplan v. United States*, 133 F.3d 469, 473 (7th Cir. 1998) ("this kind of statute of limitation challenge concerns a partnership item" and IRC § 7422 (h) "deprives the federal judiciary of subject matter jurisdiction in individual tax refund challenges involving partnership items.").

29 *Monetary II Ltd. Pship. v. Commissioner*, 47 F.3d 342, 344 (9th Cir. 1995) ("the limitations period for assessing any income tax attributable to a partnership expires three years after the partnership files its return for the tax year in question. 26 U.S.C. § 6229 (a)").

30 *Davenport Recycling Assocs. v. Comm'r*, 220 F.3d 1255, 1260 (11th Cir. 2000) ("under TEFRA, a statute of limitations defense concerns a 'partnership item,' see IRC § 6231 (a)(3)"); *Monahan v. Comm'r*, 321 F.3d 1063, 1065 n. 2 (11th Cir. 2003)("TEFRA provides a mechanism to suspend the statute of limitations with respect to the individual partners to dovetail with the proceedings at the partnership level. Normally, the period for assessing any tax with respect to a partnership item for a specific partnership taxable year is three years from the date the partnership return is filed. 26 U.S.C. § 6229 (a)").

the Tax Court identified the Tenth Circuit as another Circuit Court with which it disagrees.[31] Even the Third Circuit, which reviewed an interlocutory appeal of the Tax Court majority's sharply divided *Rhone-Poulenc* decision, refused to endorse its judicial expansion of federal court jurisdiction.[32] Thus, eight and perhaps nine or ten Circuits properly police the limits of Federal court jurisdiction. Although these decisions employ different rationales, all "have reasoned that because the FPAA limitation issue affects the partnership as a whole," and thus is a partnership item, it should not be litigated in an individual partner proceeding or decided based on individual partner facts, as such a different "result would contravene the purposes of TEFRA."[33]

A very recent case from the Sixth circuit reinforces the understanding of the majority:

> The key change wrought by TEFRA is that tax treatment of all so-called "partnership items" must be determined at the partnership level, not at the partner level. *See* I.R.C. § 6221; *Monti v. United States*, 223 F.3d 76, 78-79 (2d Cir. 2000). ...Conversely, if a partner's tax liability stems from *nonpartnership* items, the IRS may initiate deficiency proceedings against that partner individually without first proceeding against the partnership. *See Callaway v. Commissioner*, 231

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31 *LVI Invest. v. Comm'r*, 2009-254, slip op. at *8-9 (T.C. 11-9-2009) (rejecting the Tenth Circuit's decision in *Anderson v. United States*, 62 F.3d 1428 (10th Cir. 1995) along with the decisions of the First, Second, Fifth, Sixth, Ninth and Eleventh Circuits.)

32 *Rhone-Poulenc*, 249 F.3d at 183.

33 *Weiner*, 389 F.3d at 156-57.

F.3d 106, 108 (2d Cir. 2000) (finding that TEFRA's centralized proceedings do not apply to treatment of nonpartnership items).[34]

Meanwhile, the Federal (*AD Global Fund*) and D.C. (*Andantech*) Circuits opine that the FPAA limitation issue in a TEFRA partnership case brought under § 6226 may be decided based on § 6501 (a) which are legal and factual issues related to individual partners. What these decisions have in common is no analysis of whether § 6501 (a), and the individual partner tax return filing dates, present a legal and factual issue properly characterized as a partnership item under § 6231 (a)(3)—the jurisdictional prerequisite for a TEFRA partnership case under § 6226. This case, for the first time, squarely presents that question for this Court's review.

The D.C. Circuit's *Andantech* decision illustrates the resulting jurisdictional "heads the government wins—tails the taxpayer loses" aspect of this case. On the one hand, it fails to enforce TEFRA's jurisdictional limits in § 6226 (f) by deciding (as urged by the Government) the partnership statute of limitations based on individual partner statute of limitations under § 6501 (a), thus expanding jurisdiction to defeat the partnership's statute of limitations defense.[35] Yet, just a few pages later it reviews § 6226 (f)[36] to determine if subject matter

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34 *Desmet v. Comm'r.*, 581 F.3d 297, 302 (6th Cir. 2009)(*emphasis in original*).

35 *Andantech*, 331 F.3d at 976-9.

36 "[P]ursuant to § 6226(f), subject matter jurisdiction is limited to determin[ing] all partnership items of the partnership for the partnership taxable year to which the [FPAA] relates, the proper allocation of such items among the partners, and [certain penalties]."

jurisdiction extends to "a determination that the entity is not a partnership for such taxable year" and thus holding for the Government.[37] No more perfect example exists which so completely violates this Court's bar to one sided jurisdictional qualifications by "interpolat[ing] into a statute limiting the jurisdiction of a court, the qualification that such limitation does not apply when the Government invokes the jurisdiction."[38]

In sum, the Federal, D.C. Circuits, and the Fifth Circuit below, broke with the vast majority of Circuit Courts by expanding TEFRA's limited jurisdiction by judicial interpretation. Whether or not the Federal and D.C. Circuits violated this Court's mandate against such expansion inadvertently, the Fifth Circuit below did so consciously and intentionally—warranting this Court's review.

Andantech, 331 F.3d at 981.

37 *Id.* at 981.

38 *United States v. Mine Workers*, 330 U.S. 258, 314 (1947).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeal for the Fifth Circuit.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 08-60815

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CURR-SPEC PARTNERS, L.P.,
Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

August 11, 2009, Filed

Before REAVLEY, WIENER and SOUTHWICK, Circuit Judges.

JACQUES L. WIENER, JR., Circuit Judge:

Petitioner-Appellant Curr-Spec Partners, L.P. ("Curr-Spec"), asks us to interpret the interplay between the limitation provisions of Internal Revenue Code ("IRC") § 6229(a) and IRC § 6501(a). Specifically, we are asked to determine whether IRC § 6229(a) provides an independent limitations period for Respondent-Appellee Commissioner of Internal Revenue's (the "Commissioner's") issuance of a notice of Final Partnership Administrative Adjustment ("FPAA"). The Tax Court ruled in favor of the Commissioner, holding that IRC § 6229(a) does not provide a separate statute of limitations for partnership items and that the relevant limitations periods are those of each individual partner - generally three years *after the date of filing the individual's return* -- as set forth in IRC § 6501(a).[1] The Tax Court reasoned that the limitations period of IRC § 6229(a) can prolong -- but can never shorten --

the period within which the Commissioner may assess individual tax liabilities attributable to partnership items. Although this issue of statutory interpretation is *res nova* in this circuit, the Tax Court sitting as an *en banc-like* court,[2] the D.C. Circuit,[3] and the Federal Circuit[4] have each resolved it in favor of the Commissioner. Affirming the Tax Court's decision, we now join these other courts and hold that IRC § 6229(a) does not establish an independent statute of limitations for issuing FPAAs.

I. FACTS AND PROCEEDINGS

On October 11, 2000, the partnership, Curr-Spec, filed a Form 1065, U.S. Partnership Return of Income, for the taxable year 1999. More than four years later, on October 13, 2004, the Commissioner issued an FPAA determining that (1) the partnership was a sham, (2) as a result, all transactions in which it engaged would be treated as engaged in by the individual partners directly, (3) all income, deductions, gains, and losses reported by the partnership would be disallowed, and (4) the partners would be treated as having no basis in their respective partnership interests. Curr-Spec timely filed a petition in the Tax Court seeking review of the Commissioner's determination. Curr-Spec then filed motions (1) to dismiss for lack of jurisdiction and to strike, and (2) for summary judgment, contending, *inter alia*, that because the FPAA was issued more than three years after both the due date of the partnership's 1999 return and the date on which it was filed, the period of limitations for assessing tax attributable to partnership items had expired. Curr-Spec based its argument on its interpretation of IRC § 6229(a) as an

independent three-year statute of limitations (subject to specific extensions) for issuing an FPAA.

The Commissioner responded that at least three Curr-Spec partners had claimed net operating loss carryforwards of a 1999 partnership item on their respective individual 2000 and 2001 returns. The Commissioner proposed to assess tax based on the claimed carryforwards on these partners' 2000 and 2001 returns, under the theory that the FPAA was issued less than three years after the partners had filed their respective individual tax returns for those tax years, *viz.*, within the statute of limitations for individual returns as set forth in IRC § 6501(a).

The Tax Court ruled in favor of the Commissioner, emphasizing that the Internal Revenue Code "prescribes no period during which TEFRA[5] partnership-level proceedings, which begin with the mailing of an FPAA, must be commenced." The court held that IRC § 6229(a) does not provide an assessment period independent of the three-year individual limitations period of IRC § 6501(a); that instead IRC § 6229(a) provides a three-year minimum, which can extend IRC § 6501(a)'s period, but cannot curtail it.

This timely appeal followed, in which Curr-Spec challenges only the timeliness of the FPAA.[6]

II. ANALYSIS

A. Standard of Review

We review a Tax Court decision the same way that we would review a district court decision.[7] In the instant

case, Curr-Spec presents purely an issue of statutory interpretation, which we review *de novo*.[8]

B. Statutory Framework

"[TEFRA] . . . prescribes the administrative and litigation procedures for addressing partnership tax issues."[9] "[It] requires partnerships to file informational returns reflecting the distributive shares of income, gains, deductions, and credits attributable to its partners. Accordingly, the individual partners are responsible for reporting their pro rata share of tax on their income tax returns."[10] Items more appropriate for determination at the partnership level are designated "partnership items," which are to be treated at the partnership level; other items are designated "nonpartnership items," which are to be treated at the individual partner level.[11]

When the IRS proposes an adjustment of taxes at the partnership level, it issues a notice of adjustment, the FPAA, which is analogous to the statutory notice of deficiency furnished to individuals.[12] After the FPAA becomes final, the Commissioner may assess tax to the individual partners whose tax returns for the year or years in question remain open under IRC § 6501(a), for those partners' distributive shares of the adjusted partnership items.[13]

IRC § 6501(a) is the three-year statute of limitations which is generally applicable to the Commissioner's assessment of tax.[14] That section states:

> General rule. -- Except as otherwise provided in this section, the amount of any tax imposed by

> this title *shall be assessed within 3 years* after the return was filed . . . , and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. . . .[15]

IRC § 6229(a), which Curr-Spec contends is a three-year statute of limitations for issuing an FPAA -- and which, in the Commissioner's and the Tax Court's views, can only extend but not shorten the IRC § 6501(a) period -- states:

> General rule. -- Except as otherwise provided in this section, the period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year *shall not expire before* the date which is 3 years after the later of –
>
> > (1) the date on which the partnership return for such taxable year was filed, or
> >
> > (2) the last day for filing such return for such year (determined without regard to extensions).[16]

C. IRC § 6229(a) Does Not Establish an Independent Statute of Limitations for the Issuance of an FPAA

1. Jurisdiction

As an initial matter, Curr-Spec contends that in a partnership proceeding, courts have no jurisdiction to consider the filing date of a partner's individual return

because that is not a partnership item but rather a nonpartnership item.[17] The scope of the Tax Court's jurisdiction in partnership proceedings, Curr-Spec argues, is limited to determination of "all partnership items of the partnership for the partnership taxable year to which the [FPAA] relates, the proper allocation of such items among partners, and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item."[18] Yet, Congress has made clear that any partner "shall be permitted to participate in [partnership-level litigation] solely for the purpose of asserting that the period of limitations for assessing any tax attributable to partnership items has expired *with respect to such person*, and the court having jurisdiction of such action shall have jurisdiction to consider such assertion."[19] Armed with Congress's express blessing, the Tax Court does not exceed its jurisdiction when it considers the filing date of a partner's individual return.[20]

2. Merits

Curr-Spec asserts that even if the Tax Court is not jurisdictionally barred from referencing the filing date of a partner's individual return, a plain reading of IRC § 6229 and IRC § 6501 *in pari materia* yields Curr-Spec's desired result, *viz.*, that IRC § 6229(a) is an independent three-year limitations period for the issuance of an FPAA, which period begins to run on the later of the date that the partnership files its informational return or the date that it is due. In Curr-Spec's view, the TEFRA partnership procedures establish a time line governing when an FPAA may be issued, which is entirely independent of and distinct from -- and which supercedes -- the general time line

specified by IRC § 6501. The Commissioner counters that IRC § 6229(a), by its terms, sets no limitation period for the issuance of an FPAA. The Commissioner argues that -- for partnership items -- IRC § 6229(a) works to extend the IRC § 6501(a) limitations periods of the individual partners under circumstances when those periods would otherwise expire less than three years following the later of the filing date or due date for the filing of the partnership's return, disregarding extensions.

"When the plain language of a statute is unambiguous and does not lead to an absurd result, our inquiry begins and ends with the plain meaning of that language."[21] The unambiguous language of IRC § 6229(a) and IRC § 6501(a) mandates our conclusion that IRC § 6501(a) creates a three-year limitations period within which the Commissioner must assess "any tax" on individual partners -- a period which IRC § 6229(a) can never shorten, regardless of the length of time that might have elapsed between the filing of the partnership's informational return and the Commissioner's issuance of an FPAA. Rather, IRC § 6229(a) establishes only the *minimum* time period that, when necessary, extends, i.e., supercedes, the general three-year limitations period of IRC § 6501(a). For partnership items, the otherwise applicable limitations period of IRC § 6501(a) "*shall not expire before* the date which is 3 years after the later of . . . the date on which the partnership return . . . was filed" or the date on which it was due.[22] In reaching this conclusion, we find persuasive (1) the Tax Court's *en banc* decision in *Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner*,[23] (2) the D.C. Circuit's opinion in *Andantech L.L.C. v. Commissioner*,[24] and (3) the

Federal Circuit's opinion in *AD Global Fund, LLC ex rel. North Hills Holding, Inc. v. United States.*[25]

In *Rhone-Poulenc*, the Tax Court said:

> Section 6501 unequivocally provides the period of limitations within which "the amount of *any* tax imposed by this title shall be assessed." Generally, the period of limitations so provided is 3 years from the date the taxpayer's return was filed but varies in the case of certain enumerated exceptions. The pertinent language of section 6229 is: "*[T]he period for assessing any tax imposed by subtitle A* with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year *shall not expire before* the date which is 3 years after the later of" the filing or due date of the partnership return. Section 6229 provides a *minimum* period of time for the assessment of any tax attributable to partnership items (or affected items) notwithstanding the period provided for in section 6501, which is ordinarily the *maximum* period for the assessment of any tax. The section 6229 minimum period may expire before or after the section 6501 maximum period. Indeed, section 6501(n)(2) cross-references section 6229 by providing: "For *extension* of period in the case of partnership items (as defined in section 6231(a)(3)), see section 6229." [26]

In *Andantech*, the D.C. Circuit, quoted the foregoing *Rhone-Poulenc* language, and determined that nothing in the Tax Court's reasoning gave it pause.[27] That court

thus concluded that IRC § 6501(a)'s statute of limitations is applicable to all assessments made under the chapter and that IRC § 6229(a) can only extend, not cut short, the IRC § 6501(a) period for partnership items.[28] The *Andantech* court further stated that "the language of § 6229, rather than simply stating a three-year statute of limitations, indicates by the use of the term 'shall not expire' that the provision is intended to dictate a minimum period, but not an absolute restriction."[29]

The Federal Circuit, in *AD Global Fund*, reached the same result as had the D.C. Circuit and the *en banc* Tax Court before it. The court in *AD Global Fund* emphasized that

> [IRC] § 6229(a) unambiguously sets forth a minimum period for assessments of partnership items that may extend the regular statute of limitations in § 6501. Section 6501 explicitly provides that it applies to any tax imposed by the title, which would include tax imposed for partnership items . . . , [and] [n]o exception is provided for assessment of taxes for partnership items.[30]

Additionally, that court found it significant that -- unlike IRC § 6229(a) -- IRC "§ 6501 is couched in mandatory terms setting forth the maximum period within which tax assessments must be made: 'shall be assessed within three years after the return was filed.'"[31] In contrast, IRC "§ 6229(a) employs the term 'shall not expire before,' which creates a minimum period during which the period for tax assessments for partnership items may not end."[32] And, "[w]here

Congress 'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"[33] The Federal Circuit viewed the use of "shall not expire before" in IRC § 6229(a) as significant. That court described its result as consistent with the TEFRA scheme, which generally requires determination of the tax treatment of partnership items at the partnership level before they are assessed at the partner level.[34] First, the Commissioner ascertains all partnership items in a consolidated partnership-level determination; then IRC § 6501 controls, separately as to each individual partner, the tax consequences of that initial partnership-level determination.[35] IRC § 6229(a) "may extend the regular statute of limitations in § 6501(a) for assessments to individual partners, but it does not alter the statutory scheme of determining partnership items in one partnership-level proceeding."[36]

We perceive no flaw in the interpretations of those courts, which reached the instant issue before we did, and we adopt their analyses.[37] We emphasize, however, that once a partner's individual three-year statute of limitations under IRC § 6501(a) for any given tax year has run without that period having been extended under IRC § 6229 or any other statute,[38] the Commissioner has no authority to assess tax based on any partnership items against that partner for that closed tax year, even if the Commissioner subsequently issues an FPAA for that year. The plain language of IRC § 6501(a) guarantees as much. As counsel for the Commissioner represented at oral argument, "[i]f one partner carried [partnership losses] over ten years, but

the others did not and used it all in '99, the Commissioner wouldn't be able to assess against them. . . . It's only to the extent that a partner's individual statute of limitations is still open that we could do an assessment."

The practical result of our holding today is that the Commissioner may issue an FPAA at *anytime*, subject only to the practical limitation that the FPAA may affect only those partners whose individual returns remain open under IRC § 6501(a) or some extension thereto, such as the *minimum* period of IRC § 6229(a), before which the statute of limitations may not expire. Stated differently, the Commissioner is free to assess partnership-item tax on any taxpayer who, on his individual tax return, has taken advantage of the now-challenged partnership items within the preceding three years (or, in the event of an extension, within the extended statute of limitations). Even though our holding will permit assessments against some partners and not against others, depending on their respective limitations periods under IRC § 6501(a), this interpretation is consistent with the other portions of IRC § 6229, which explicitly contemplate distinct treatment of different partners.[39] If Congress intended a different result, it is for Congress -- not this court -- to re-draft the statutory language.[40]

We continue briefly to explain that our decision today does not contradict this circuit's precedent. On at least two occasions -- in *Weiner v. United States*[41] and *In re Martinez*[42] -- we have referred to IRC § 6229(a) as a three-year statute of limitations. Yet, those descriptions were mere dicta,[43] and they did not address the relationship of IRC § 6229(a) to IRC §

6501(a). They thus do not constrain today's decision. Weiner involved multiple partners who had commenced *partner-level refund suits*, arguing that IRC § 6229(a) statutorily barred an FPAA.[44] There we had no need to consider the merits of the taxpayers' argument because we determined that IRC § 7422(h) deprived us of jurisdiction.[45] IRC § 7422(h) provides that "[n]o action may be brought for a refund attributable to partnership items."[46] And, because we held that the IRC § 6229(a) period is a partnership item, "the district courts lack jurisdiction to decide the FPAA statute of limitations issue."[47] The jurisdictional issue was dispositive in *Weiner*; to the extent we discussed IRC § 6229 as a strict statute of limitations for the issuance of an FPAA, it was mere dicta.

In *In re Martinez*, the issue was the extent to which a partnership's *conflicted* tax-matters partner could bind the other partners to an agreement into which he and the Commissioner had entered to extend the IRC § 6229(a) period.[48] Under IRC § 6229(b)(1)(B), such agreements usually bind all partners.[49] The *In re Martinez* taxpayer (who was not the tax-matters partner) argued that the tax-matters partner's conflict of interest nullified his actions with respect to the partnership. We acknowledged that "there may be times when a tax matters partner's actions beneficial to himself are so contrary to the interests of the partnership that they are rendered null with respect to the partners."[50] We concluded, however, that *In re Martinez* was not such a case, and that the extension granted to the Commissioner applied to all partners. [51] As in *Weiner*, the interplay of IRC § 6229(a) and IRC § 6501(a) was not at issue, and our reference to IRC § 6229(a) as a three-year statute of limitations was dicta.

We thus have not previously had occasion to address squarely the instant issue, and our decision today is not in conflict with our precedent.[52]

III. CONCLUSION

We hold that the Tax Court correctly interpreted IRC § 6229(a) and IRC § 6501(a). IRC § 6229(a) is not an independent statute of limitations, i.e, it sets no maximum period within which the Commissioner must issue an FPAA. The three-year statute of limitations of IRC § 6501(a) is the period within which the Commissioner may assess taxes on an individual partner (subject to *extension*) for partnership items. We also hold that the Tax Court does not overreach its jurisdiction in partnership-level proceedings when, for limitations purposes, it considers whether a partner's individual tax return remains open to assessment.

Footnotes

1Even though the statute of limitations runs three years after the date that the return was *filed*, *see* IRC § 6501(a), a return filed early is generally deemed filed on the date that the return was due, thereby giving the Commissioner more than three years within which to assess tax. *See id.* § 6501(b)(1).

2*Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner*, 114 T.C. 533, 2000 WL 863142 (2000) (en banc). Technically, the Tax Court does not sit *en banc*. Nevertheless, the full Tax Court reviews cases that the Chief Judge selects for review by the entire court. *See* IRC § 7460; David F. Shores, *Deferential Review of Tax Court Decisions*: Dobson *Revisited*, 49 TAX LAW. 629,

646 n.117 (1996). *Rhone-Poulenc* is one such case, and, for simplicity, we will refer to it as decided *en banc*.

3*Andantech L.L.C. v. Commissioner*, 331 F.3d 972, 356 U.S. App. D.C. 387 (D.C. Cir. 2003).

4*AD Global Fund, LLC ex rel. N. Hills Holding, Inc. v. United States*, 481 F.3d 1351 (Fed. Cir. 2007).

5"TEFRA" is the Tax Equity and Fiscal Responsibility Act of 1982.

6In the instant proceedings, Curr-Spec has stipulated to the merits of the Commissioner's adjustments in the FPAA.

7*Minton v. Commissioner*, 562 F.3d 730, 734 (5th Cir. 2009) (per curiam).

8*Copeland v. Commissioner*, 290 F.3d 326, 329 (5th Cir. 2002).

9*United States v. Martinez (In re Martinez)*, 564 F.3d 719, 726 (5th Cir. 2009) (citing Pub. L. No. 97-248, § 402(a), 96 Stat. 648, 653 (1982) (codified as amended at IRC §§ 6221-23)).

10*Weiner v. United States*, 389 F.3d 152, 154 (5th Cir. 2004) (internal citation omitted); *see* IRC § 6031 (partnership returns); *id.* §§ 701-04 (individual partners' reporting distributive shares of partnership income).

11*In re Martinez*, 564 F.3d at 726; *see* IRC § 6221 (mandating that partnership items be determined at the partnership level). A "partnership item" is

statutorily defined as:

> any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level.

IRC § 6231(a)(3); *see id.* § 6231(a)(4) (defining "nonpartnership item").

12*In re Martinez*, 564 F.3d at 726 (citing IRC § 6223(a)).

13*See* IRC § 6225(a) (stating that the FPAA becomes final if it goes unchallenged for 150 days, or upon final judicial resolution of a petition for review of the FPAA). The IRS may sometimes assess this tax on individual partners, without notice, as a computational adjustment. *See Callaway v. Commissioner*, 231 F.3d 106, 109-10 (2d Cir. 2000) (citing IRC §§ 6225(a), 6230(a)(1), 6231(a)(6)). Other times, factual determinations of "affected items" at the partner level are necessary, which requires the issuance of a notice of deficiency. *See id.* at 110 (citing IRC § 6230(a)(2)(A)(i)); *see also* IRC § 6231(a)(5) (defining "affected item" as "any item to the extent such item is affected by a partnership item").

14*Payne v. Commissioner*, 224 F.3d 415, 419-20 (5th Cir. 2000). This statute of limitations is subject to provisions in IRC § 6501, IRC § 6503, and elsewhere that toll the limitations period, *see Doe v. KPMG, LLP*, 398 F.3d 686, 688-89 (5th Cir. 2005), none of which are

at issue in the instant appeal.

15IRC § 6501(a) (emphasis added).

16*Id.* § 6229(a) (emphasis added).

17As in the principal issue of statutory interpretation presented in Curr-Spec's appeal, our review of the Tax Court's jurisdiction is *de novo*. *Ferguson v. Commissioner*, 568 F.3d 498, 502 (5th Cir. 2009).

18IRC § 6226(f).

19*Id.* § 6226(d)(1) (emphasis added).

20Our opinion in *Weiner v. United States* is not to the contrary. 389 F.3d 152 (5th Cir. 2004). We decided that case on the dissimilar issue "whether district courts have jurisdiction to decide the FPAA statute of limitations question in [individual] refund actions." *Id.* at 155. More specifically, we asked "whether the taxpayers' refund requests [were] attributable to any partnership item such that the district court would be deprived of jurisdiction." *Id.* We concluded that IRC § 6229(a)'s period was a partnership item and that thus "the district courts lack jurisdiction to decide the FPAA statute of limitations issue" (which, today, we conclusively determine is not an independent "statute of limitations"). *See id.* at 156, 159. In *Weiner*, we had no occasion to inquire whether, in a partnership proceeding, the Tax Court was deprived of jurisdiction to consider the filing date of a partner's individual return.

21*United States v. Dison*, 573 F.3d 204, 2009 U.S. App.

LEXIS 14054, 2009 WL 1759029, at *2 (5th Cir. 2009) (internal quotation marks and citation omitted).

22IRC § 6229(a) (emphasis added).

23114 T.C. 533, 2000 WL 863142 (2000) (en banc).

24331 F.3d 972, 356 U.S. App. D.C. 387 (D.C. Cir. 2003).

25481 F.3d 1351 (Fed. Cir. 2007). The Ninth Circuit has also referred to IRC § 6229(a) as a minimum period for assessment. *Bakersfield Energy Partners, LP v. Commissioner*, 568 F.3d 767, 770 n.5 (9th Cir. 2009) ("Subsection (a) [of IRC § 6229] provides the minimum time period in which the IRS can assess a tax deficiency.").

26114 T.C. at 542 (internal citations and footnotes omitted) (emphases added by Tax Court).

27331 F.3d at 977.

28*Id.*

29*Id.*

30481 F.3d at 1354 (internal citation omitted).

31*Id.* (quoting IRC § 6501(a)).

32*Id.*; *see Salman Ranch Ltd. v. United States*, 573 F.3d 1362, 2009 U.S. App. LEXIS 16912, 2009 WL 2256020, at *3 (Fed. Cir. 2009) (explaining that the general three-year period of IRC § 6501(a) applies to partnership items and that IRC § 6229(a) sets only a

minimum period for assessments of partnership items).

33*AD Global Fund*, 481 F.3d at 1354 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002)).

34*Id.* at 1354-55.

35*Id.* at 1355.

36*Id.*

37The unambiguous statutory language mandates our result today. Nevertheless, even if the correct decision were not so clear, we would look to the opinions of the D.C. and Federal Circuits for persuasive guidance. *See Alfaro v. Commissioner*, 349 F.3d 225, 229 (5th Cir. 2003) ("We are always chary to create a circuit split.").

38The limitations period may be extended for any of several reasons. As we have discussed, IRC § 6229(a) provides for an extension when three years from the date the partnership return is filed or is due has not yet expired. The IRC § 6229(a) period itself is suspended when the Commissioner files an FPAA. *See* IRC § 6229(d). The FPAA suspends the running of the IRC § 6229(a) period until one year after the close of the period during which a petition for readjustment of the partnership items may be filed, or, if such a petition is filed, one year after the court's decision in that proceeding becomes final. *Id.; see United States v. Martinez (In re Martinez)*, 564 F.3d, 719, 727 (5th Cir. 2009). Of course, if a partner's limitations period has already closed, IRC § 6229(d) cannot re-open that period.

An individual's limitations period would also be extended *forever* if that person filed "a false or fraudulent return with the intent to evade tax." IRC § 6501(c)(1).

39*See, e.g.*, IRC § 6229(b)(1)(A) (permitting partners to enter into *individual agreements* with the Commissioner to extend the three-year period of IRC § 6229(a)); *id.* § 6229(c)(1) (setting different limitations periods for partners when a partnership submits a false or fraudulent return, depending on each partner's involvement in the fraud); *id.* § 6229(h) (providing for a suspension of the IRC § 6229(a) period for a partner who enters bankruptcy proceedings).

40*Lamie v. U.S. Trustee*, 540 U.S. 526, 542, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent.").

41389 F.3d 152, 154-55 (5th Cir. 2004).

42*United States v. Martinez (In re Martinez)*, 564 F.3d 719, 724, 726 (5th Cir. 2009).

43*See Centennial Ins. Co. v. Ryder Truck Rental, Inc.*, 149 F.3d 378, 385-86 (5th Cir. 1998) ("That which is 'obiter dictum' is stated only 'by the way' to the holding of a case and does not constitute an essential or integral part of the legal reasoning behind a decision." (citing Charles W. Collier, *Precedent and Legal Authority*, 1988 WIS. L.Rev. 771, 772)); *see also United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) (Posner, J.) (noting that as a practical matter, a court can determine

whether a particular passage in an earlier opinion is dictum by considering factors such as whether "the passage was unnecessary to the outcome of the earlier case and therefore perhaps not as fully considered as it would have been if it were essential to the outcome," or whether "the passage was not an integral part of the earlier opinion -- it can be sloughed off without damaging the analytical structure of the opinion, and so it was a redundant part of that opinion and, again, may not have been fully considered").

44389 F.3d at 156.

45*Id.* at 156-59.

46IRC § 7422(h).

47*See Weiner*, 389 F.3d at 156, 159. We did state, however, that one factor in favor of determination at the partnership level was that "[t]he timeliness of an FPAA affects the IRS's ability to make adjustments to partnership items, which in turn affects all partners alike." *Id.* at 158. This statement remains true because an extension of the IRC § 6501(a) statute of limitations by IRC § 6229(a) affects the IRS's ability to adjust partnership items, which affects all partners alike.

48*United States v. Martinez (In re Martinez)*, 564 F.3d 719, 727 (5th Cir. 2009).

49*See* IRC § 6229(b)(1)(B) ("The period described in subsection (a) . . . may be extended . . . with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner . . . before the expiration of such period.").

50*In re Martinez*, 564 F.3d at 728.

51*Id.*

52Curr-Spec also interprets the Second Circuit's opinion in *Callaway* as rejecting *Rhone-Poulenc*. *Callaway v. Commissioner*, 231 F.3d 106, 110 (2d Cir. 2000). As in our circuit's precedent, *Callaway's* discussion of IRC § 6229(a) occurred in dicta. *See* id. at 110 (referring to IRC § 6229 as a three-year statute of limitations, which "supercedes" the individual partner's three-year period under IRC § 6501); id. at 112-13 (describing the effect that IRC § 6229(a) would have had in the absence of an extension). The issue in *Callaway* was the conversion of partnership items into nonpartnership items. *See id.* at 116. The relationship of IRC § 6229(a) to IRC § 6501(a) was not at issue. In fact, *Callaway* interpreted the similar "shall not expire before . . . 1 year" language of IRC § 6229(f) as prescribing the time within which "the limitations period on assessments . . . could not have expired *sooner*." *Id.* at 122 & n.20 (emphasis in original). The court expressly said that, depending on the facts, such a provision might "not provide the limiting date." *Id.* Our analysis in the instant case is consistent with such an interpretation. Additionally, the Second Circuit has, in a subsequent case, cautioned that IRC "section 6229(a), by its terms, does not purport to *limit* the time available to assess tax, but only to *extend* limitations otherwise applicable." *Field v. United States*, 381 F.3d 109, 112 n.1 (2d Cir. 2004) (emphasis in original). Such language offers a clear indication that the Second Circuit does not view *Callaway* as having held the opposite. *See U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 149 (2d Cir. 2001) ("[W]e

will not overrule a prior decision of a panel of this Court absent a change in the law by higher authority or by way of an in banc proceeding of this Court." (internal quotation marks omitted)).

No. 1350-05

UNITED STATES TAX COURT

CURR-SPEC PARTNERS, LP, CURR-SPEC MANAGERS, LLC, TAX MATTERS PARTNER, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent *

September 24, 2007, Filed

COUNSEL: J. Winston Krause, for petitioner.

Donna F. Herbert and Jonathon H. Sloat, for respondent.

MEMORANDUM OPINION

WELLS, Judge: The instant matter is a so-called Son-of-Boss case [1] and is before the Court on the following motions: (1) Petitioner's motion to dismiss for lack of jurisdiction and to strike; (2) petitioner's motion for summary judgment; (3) respondent's motion for summary judgment; and (4) petitioner's motion for leave to file a second amended petition. For the reasons stated below, we shall grant petitioner's motion for leave to file a second amended petition and deny the remaining motions. Unless otherwise indicated, all Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code, as amended.

BACKGROUND

Curr-Spec Partners, L.P. (the partnership), filed a Form 1065, U.S. Partnership Return of Income, for the taxable year 1999 on or about October 11, 2000. The partnership reported $ 6,239,938 of capital contributions, a net loss of $ 2,343, and distributions to partners of $ 6,237,595.

On October 13, 2004, respondent issued Curr-Spec Managers, L.L.C., Tax Matters Partner (petitioner), a notice of final partnership administrative adjustment (FPAA) for the taxable year 1999. Respondent determined, among other things: (1) The partnership was a sham; (2) as a result, all transactions engaged in by the partnership would be treated as engaged in directly by the partners; (3) all income, deductions, gains, and losses reported by the partnership would be disallowed; and (4) the partners would be treated as having no bases in their respective partnership interests. Petitioner filed a timely petition for review of respondent's determination. [2]

1. Petitioner's Motion To Dismiss for Lack of Jurisdiction and To Strike and Petitioner's Motion for Summary Judgment

Petitioner filed a motion to dismiss for lack of jurisdiction and to strike. The motion states that, because the FPAA was issued more than 3 years after the partnership filed its 1999 return, the period of limitations for assessing tax attributable to partnership items has expired. Petitioner asks the Court to strike the portion of respondent's answer that addresses matters outside the Court's jurisdiction. Petitioner also filed a motion for summary judgment that advances similar arguments. Respondent concedes

that the FPAA was issued more than 3 years after the partnership filed its 1999 return.

Respondent contends, however, that at least three partners claimed a net operating loss (NOL) carryforward of a 1999 partnership item in 2000 and 2001. Respondent wishes to disallow the claimed NOL carryforwards if the adjustments in the FPAA are upheld. Respondent contends that the FPAA was issued less than 3 years after the partners filed their respective 2000 and 2001 tax returns and, therefore, the assessment period for those years has not expired.

2. Respondent's Motion for Summary Judgment and Petitioner's Motion for Leave To File A Second Amended Petition

The FPAA makes a number of adjustments to the 1999 partnership return. Although the petition asserts that the FPAA was untimely, it does not assign error to the determination that the partnership was a sham or to the other adjustments discussed above. Respondent filed a motion for summary judgment, asserting that any issues not raised in the petition are deemed conceded under Rule 34(b)(4). After respondent had filed the motion for summary judgment, petitioner filed a motion for leave to file a second amended petition. The motion states that "Petitioner wishes to amend its petition to more particularly comply with [Rule] 34(b)(4) by alleging further factual basis for respondent's various errors as contained in * * * [the FPAA]." The proposed second amended petition assigns error to each adjustment in the FPAA.

DISCUSSION

I. Whether the Assessment Period Has Expired

Summary judgment is appropriate "if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law." Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), affd. 17 F.3d 965 (7th Cir. 1994). The moving party bears the burden of proving that there is no genuine issue of material fact, and factual inferences will be read in a manner most favorable to the party opposing summary judgment. Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985).

The instant case is a partnership-level proceeding subject to the unified audit and litigation procedures of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. 97-248, sec. 401, 96 Stat. 648. The Internal Revenue Code prescribes no period during which TEFRA partnership-level proceedings, which begin with the mailing of an FPAA, must be commenced. Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner, 114 T.C. 533, 534 (2000). If partnership-level proceedings are commenced after the time for assessing tax against the partners has expired, however, the proceedings will be of no avail because the expiration of the period for assessing tax against the partners will bar any assessments attributable to the partnership items. Id. at 534-535.

In general, section 6501(a) provides that the amount of any tax imposed shall be assessed within 3 years after the return was filed. The term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss,

deduction, or credit). Id. Section 6229(a) provides, however, that the period for assessing tax attributable to partnership items for a partnership taxable year shall not expire before the date which is 3 years after the later of (1) the date on which the partnership return for such taxable year was filed, or (2) the last day for filing such return for such year.

In Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner, supra, we addressed the interaction of sections 6229 and 6501. We rejected the taxpayer's argument that section 6229 provides an assessment period that is independent of the period described in section 6501. We held that sections 6229 and 6501 provide alternative periods within which to assess tax with respect to partnership items, with the later-expiring period governing in a particular case. Id. at 540-541. We also held that the issuance of an FPAA suspends the period to assess tax under section 6501. Id. at 552-553. We followed this holding in Andantech L.L.C. v. Commissioner, T.C. Memo. 2002-97, affd. in relevant part and remanded in part 356 U.S. App. D.C. 387, 331 F.3d 972 (D.C. Cir. 2003).

The instant case presents a slightly different issue from Rhone-Poulenc and Andantech, however, because respondent issued the FPAA for the taxable year 1999 while conceding that the assessment period for that year had expired. Respondent instead seeks to assess tax for the taxable years 2000 and 2001 that is attributable to a 1999 partnership item. We recently addressed a similar situation and held that a 1999 FPAA was timely even though the assessment period for that year had expired. See Kligfeld Holdings v. Commissioner, 128 T.C. 192 (2007); see also G-5 Inv. Pship. v. Commissioner, 128 T.C. 186 (2007). Petitioner

does not dispute that the FPAA was issued within 3 years of the time the partners filed their respective 2000 and 2001 tax returns. Accordingly, under the holding of Kligfeld Holdings and similar cases, the assessment period has not expired and remains suspended.

We note, however, that none of the above-cited cases was appealable to the Court of Appeals for the Fifth Circuit. [3] Under the Golsen rule, we follow the law of the Court of Appeals to which a case is appealable. Golsen v. Commissioner, 54 T.C. 742, 757 (1970), affd. 445 F.2d 985 (10th Cir. 1971). We therefore consider whether we must reach a contrary result under Fifth Circuit law.

In Weiner v. United States, 389 F.3d 152 (5th Cir. 2004), the taxpayers appealed from decisions entered against them in refund suits. The taxpayers earlier had been parties to partnership-level proceedings in the Tax Court. Pursuant to settlements of their claims to flow-through deductions from the partnerships involved in those proceedings, the Commissioner assessed tax and interest against them. The taxpayers then commenced the refund suits in District Court, contending that the assessments were barred by the statute of limitations. Id. at 153-154.

The Court of Appeals held that the District Courts lacked jurisdiction to decide the statute of limitations issue because it was a partnership item. Id. at 157. Under TEFRA, the treatment of all partnership items must be determined at the partnership level. Sec. 6221. Accordingly, the District Courts could not decide the statute of limitations issue in a partner-level

proceeding. Weiner v. United States, supra at 157. In reaching its conclusion, the Court of Appeals stated that the Commissioner has "three years from the later of (1) the date a partnership return is due, or (2) the date the partnership return is filed, to issue an FPAA." Id. at 154-155 (citing section 6229(a)).

On its face, Weiner might suggest that the Court of Appeals for the Fifth Circuit views the assessment period under section 6229 as independent of the period provided in section 6501. The Court of Appeals in Weiner, however, did not mention section 6501 or discuss any of the cases which hold that sections 6229 and 6501 establish alternative assessment periods. Furthermore, because the Court of Appeals concluded that the statute of limitations issue was a partnership item, the result would have been the same regardless of whether the assessment period was controlled by section 6229 or 6501. See id. at 155 ("The more precise question in this case * * * is whether the taxpayers' refund requests are attributable to any partnership item such that the district court would be deprived of jurisdiction."). The U.S. Court of Federal Claims would also distinguish Weiner from the facts of the instant case. In Grapevine Imports, Ltd. v. United States, 71 Fed. Cl. 324 (2006), the court concluded that the above-quoted language from Weiner as to the date of expiration of the assessment period was dictum and that the Court of Appeals was "not focused on the issue involving the interplay between sections 6229(a) and 6501." Id. at 330.

We conclude that the period for assessing tax against the partners has not expired. Neither Weiner nor any of the other cases cited by petitioner dictate a contrary result. Accordingly, we shall deny petitioner's motion to

dismiss for lack of jurisdiction and to strike and petitioner's motion for summary judgment. [4]

II. Whether Petitioner May Amend Its Petition A Second Time

Rule 34(b)(4) provides that the petition in a deficiency or liability action shall contain "Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner * * *. * * * Any issue not raised in the assignments of error shall be deemed to be conceded." Rule 241(d)(1)(C) provides a similar rule for a petition in a partnership action.

Petitioner seeks to amend its petition a second time to assign error to the adjustments in the FPAA. Rule 41(a) provides in part: "A party may amend a pleading once as a matter of course at any time before a responsive pleading is served. * * * Otherwise a party may amend a pleading only by leave of Court or by written consent of the adverse party, and leave shall be given freely when justice so requires." Rule 41 is similar to rule 15(a) of the Federal Rules of Civil Procedure, which also declares that leave to amend "shall be given freely when justice so requires." Kramer v. Commissioner, 89 T.C. 1081, 1084-1085 (1987) (citing Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)). We have looked to holdings under rule 15(a) of the Federal Rules of Civil Procedure for guidance in interpreting Rule 41. Id.

The granting or denial of an opportunity to amend a pleading is within the discretion of the trial court. See Foman v. Davis, supra at 182. The Court of Appeals for the Fifth Circuit has held, however, that rule 15(a) of

the Federal Rules of Civil Procedure "severely restricts" the trial court's discretion and "evinces a bias in favor of granting leave to amend." Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 597 (5th Cir. 1981). Unless there is a substantial reason to deny leave to amend, the discretion of the trial court is not broad enough to permit denial. Id. at 598. "The types of reasons that might justify denial of permission to amend a pleading include undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, and undue prejudice to the opposing party." Id. (citations omitted); see also Pinson v. Commissioner, T.C. Memo. 2000-393.

Respondent argues that we should deny petitioner's motion because of undue delay, noting that the motion was filed approximately 11 months after the amended petition was filed. See supra note 4. Unless the delay is excessive, however, mere passage of time need not result in refusal of leave to amend. Dussouy v. Gulf Coast Inv. Corp., supra (reversing denial of motion for leave to amend filed 41 days after a party was dismissed from the case); cf. Russo v. Commissioner, 98 T.C. 28 (1992) (denying motion filed 8 years after the petition was filed).

We also note that the instant case was not scheduled for trial when petitioner filed its motion. [5] It is therefore distinguishable from many of the cases in which the denial of a motion for leave to amend was upheld. See, e.g., Ashe v. Corley, 992 F.2d 540 (5th Cir. 1993) (upholding denial of a motion for leave to amend filed 1 week before trial); Jackson v. Columbus Dodge, Inc., 676 F.2d 120 (5th Cir. 1982) (upholding denial of a motion filed 1 day before a pretrial conference and 19

months after the complaint was filed); Rhodes v. Amarillo Hospital Dist., 654 F.2d 1148 (5th Cir. 1981) (upholding denial of a motion filed 30 months after the initial complaint and 3 weeks before trial). Accordingly, we conclude that there is no undue delay in the instant case.

Respondent contends that respondent will be prejudiced if petitioner's motion is granted because additional discovery will be necessary. The need for additional discovery is a factor to consider in granting or denying a motion for leave to amend. See Ross v. Houston Indep. School Dist., 699 F.2d 218, 229 (5th Cir. 1983). Additional discovery often will be required, however, when a petition is amended. The nonmoving party generally is not prejudiced if it can present evidence as to the issues raised by the amendment. See Steiner v. Commissioner, T.C. Memo. 1995-122; see also Ross v. Houston Indep. School Dist., supra (upholding denial of a motion for leave where the amendment would require additional discovery, add 26 new parties, and likely require several additional years for preparation and trial of the case); cf. Kramer v. Commissioner, supra at 1085 (denying a motion for leave filed after trial because the Commissioner could not offer evidence as to the newly raised issue).

We also note that, aside from the statute of limitations issue discussed above, petitioner appears to address only the adjustments made in the FPAA. Thus, the instant case is not one where the amendment would establish "an entirely new factual basis" for the movant's claims. Cf. Little v. Liquid Air Corp., 952 F.2d 841, 846 (5th Cir. 1992). In sum, any burden of additional discovery does not overcome the factors in

favor of granting leave to amend. See Dussouy v. Gulf Coast Inv. Corp., supra.

Finally, respondent appears to argue that petitioner has shown bad faith. Respondent contends that petitioner's motion is "an apparent attempt to escape judgment as a matter of law based on respondent's motion for summary judgment". Respondent cites several cases upholding the denial of a motion for leave to amend that was filed after the opposing party had filed a motion for summary judgment. See, e.g., Little v. Liquid Air Corp., supra; Overseas Inns S.A. P.A. v. United States, 911 F.2d 1146 (5th Cir. 1990); Layfield v. Bill Heard Chevrolet Co., 607 F.2d 1097 (5th Cir. 1979).

As respondent acknowledges, however, there is no per se rule requiring the trial court to deny a motion for leave to amend after a motion for summary judgment has been filed. See Zaidi v. Ehrlich, 732 F.2d 1218, 1220 (5th Cir. 1984); Bamm, Inc. v. GAF Corp., 651 F.2d 389, 391-392 (5th Cir. 1981). Considering that the instant case was not scheduled for trial when petitioner filed its motion and that the issues are largely confined to the adjustments made in the FPAA, we conclude that it is appropriate to allow petitioner to amend its petition again.

Having decided that petitioner may amend its petition again, we shall deny respondent's motion for summary judgment. The second amended petition assigns error to the adjustments in the FPAA, thus raising genuine issues as to material facts. Summary judgment therefore is inappropriate. See Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. at 520.

To reflect the foregoing,

An appropriate order will be issued.

Footnotes

* The Court issued an opinion in this case, T.C. Memo. 2006266, on Dec. 14, 2006, which was withdrawn by order dated Jan. 3, 2007.

1 See Kligfeld Holdings v. Commissioner, 128 T.C. 192 (2007); see also G-5 Inv. Pship. v. Commissioner, 128 T.C. 186 (2007).

2 Petitioner filed a petition in January 2005 and an amended petition in September 2005. For convenience, we refer to these collectively as the petition.

3 The parties agree that the instant case is appealable to the Court of Appeals for the Fifth Circuit.

4 Petitioner also argues at length that we cannot consider when the partners filed their respective tax returns because the filing dates are nonpartnership items. This position contradicts the holding of Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner, 114 T.C. 533 (2000), where we examined the partners' filing dates to decide when the assessment period under sec. 6501 expired. Although petitioner contends its position does not conflict with our existing caselaw, petitioner has not explained how the Court can apply the holding of Rhone-Poulenc without examining the partners' filing dates. Petitioner's argument is without merit.

5 The instant case was calendared for trial on the Oct. 30, 2006, San Antonio, Texas, trial session but was continued after the parties filed a joint motion for continuance of trial.

Filed 10/16/2009
No. 08-60815
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CURR-SPEC PARTNERS, L.P.,
Petitioner-Appellant
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

Appeal from a Decision of the United States Tax Court

ON PETITION FOR REHEARING EN BANC

Before REAVLEY, WIENER and SOUTHWICK, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

Supreme Court, U.S.
FILED
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No. 09-871

In the Supreme Court of the United States

CURR-SPEC PARTNERS, L.P., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Partnerships are pass-through entities that do not themselves pay federal income tax, but nonetheless file annual information returns stating their income, gains, losses, deductions, and credits. Those items are then allocated among the individual partners, and any resulting income-tax liability is assessed against the individual partners. To adjust "partnership items," the Internal Revenue Service must issue a notice of final partnership administrative adjustment (FPAA). Adjustments in the FPAA may affect the tax liability of the individual partners, against whom additional income-tax liabilities arising from the adjustments will be assessed. Certain partners may (as was done here) challenge the FPAA in a partnership-level proceeding in the Tax Court. The questions presented are as follows:

1. Whether 26 U.S.C. 6229(a) provides only a minimum period for assessments attributable to partnership items and thus may extend, but not shorten, the statute of limitations in 26 U.S.C. 6501(a) for assessments against individual partners.

2. Whether the Tax Court has jurisdiction, in a partnership-level proceeding, to consider whether the statute of limitations for assessments attributable to partnership items remains open for a particular partner.

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In the Supreme Court of the United States

No. 09-871

CURR-SPEC PARTNERS, L.P., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 579 F.3d 391. The opinion of the Tax Court (Pet. App. 23a-34a) is not reported but is reprinted in 94 T.C.M. (CCH) 314.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2009. A petition for rehearing was denied on October 16, 2009 (Pet. App. 35a). The petition for a writ of certiorari was filed on January 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

1. Partnerships are pass-through entities that do not pay federal income tax but are required to file annual information returns. 26 U.S.C. 6031; 26 C.F.R. 1.701-1, 1.6031-1(a)(1); *United States* v. *Basye*, 410 U.S. 441, 448 (1973). All income, gains, losses, deductions, and credits are allocated among the individual partners, who must report the allocations on their individual income-tax returns. 26 U.S.C. 701-704; *Conway* v. *United States*, 326 F.3d 1268, 1271 (Fed. Cir. 2003). Income tax is thus assessed against the individual partners rather than against the partnership.

a. A unified procedure for determining the proper tax treatment of partnership items was established in Section 402(a) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324, 648.[1] Under TEFRA, the Internal Revenue Service (IRS or Service) must issue a notice of final partnership administrative adjustment (FPAA) in order to adjust items reported on a partnership return. See 26 U.S.C. 6223(a)(2) and (d)(2), 6225(a). The FPAA does not itself assess income tax, but once the FPAA becomes final, its adjustments to partnership items are allocated to the individual partners, and any resulting tax liability is assessed against them. See 26 U.S.C. 6201, 6225, 6230(a)(1).

Certain partners may contest the FPAA by filing a petition in (among other fora) the United States Tax

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[1] TEFRA has since been amended by, *inter alia*, the Tax Reform Act of 1984, Pub. L. No. 98-369, § 714(p), 98 Stat. 964, the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1307(c)(3)(B), 110 Stat. 1782, and the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §§ 1231-1243, 111 Stat. 1020-1029. TEFRA in its current form is codified at 26 U.S.C. 6221-6234.

Court. See 26 U.S.C. 6226(a)-(b). In that partnership-level proceeding, the Tax Court has "jurisdiction to determine all partnership items of the partnership for the partnership taxable year to which the [FPAA] relates, the proper allocation of such items among the partners, and [penalties]." 26 U.S.C. 6226(f). "Partnership item" is further defined by regulations promulgated by the Secretary of the Treasury at 26 C.F.R. 301.6231(a)(3)-1(b). In a partnership-level proceeding, the Tax Court is also authorized to determine whether a particular partner has no interest in the outcome of the proceeding because "the period of limitations for assessing any tax attributable to partnership items has expired with respect to [that partner]" 26 U.S.C. 6226(d)(1). The Tax Court's decision is subject to review in the court of appeals. 26 U.S.C. 7482.

b. The statute of limitations for tax assessments is set forth in 26 U.S.C. 6501. As relevant here, Section 6501(a) states that "the amount of any tax imposed by this title [26 U.S.C.] shall be assessed within 3 years after the return was filed." Section 6501(a) further provides that "the term 'return' means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit)." Section 6501(n)(2) states: "For extension of period in the case of partnership items * * *, see section 6229." Section 6229(a), in turn, states that "the period for assessing any [income tax] with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the later of—(1) the date on which the partnership return for such taxable year was filed, or (2) the last day for filing

such return for such year (determined without regard to extensions)."

2. Curr-Spec Partners, L.P., was the vehicle for an abusive "Son-of-BOSS" tax shelter scheme. Pet. App. 23a.[2] The IRS examined Curr-Spec's partnership return for the taxable year 1999 and determined, *inter alia*, that the partnership was a sham and should be disregarded for tax purposes. *Id.* at 24a. Accordingly, the Service issued an FPAA in 2004. *Ibid.* The Service recognized that although it was barred by the statute of limitations from assessing additional tax against the partners for 1999, the individual partners had claimed net operating losses attributable to partnership items, carried forward from 1999 to 2000 and later years, for which the assessment period remained open. *Id.* at 24a-25a.

3. J. Winston Krause filed a petition in the Tax Court challenging the FPAA, conceding all issues except the timeliness of the FPAA. Pet. App. 2a-3a, 14a n.6. Krause did not dispute that the FPAA was issued within three years after the dates on which Curr-Spec's indi-

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[2] The petition for a writ of certiorari names Curr-Spec Partners, L.P., as the petitioner. Although identified in the caption of the court of appeals' decision below, Curr-Spec was not a proper party to the proceedings. The partners, and not the partnership, are the parties in a proceeding challenging an FPAA. 26 U.S.C. 6226; *Chef's Choice Produce, Ltd.* v. *Commissioner*, 95 T.C. 388, 394-395 (1990). The Tax Court petition that commenced this case was filed by J. Winston Krause (counsel of record for Curr-Spec in this Court), who identified himself as "successor-in-interest" to Curr-Spec's tax matters partner, Curr-Spec Managers, LLC. Neither the partnership nor the LLC was still in existence at the time the Tax Court petition was filed, but Krause was a notice partner who could file a petition in his own right under 26 U.S.C. 6226(b). To avoid ambiguity, this brief will refer to "Curr Spec" or "Krause" as appropriate.

vidual partners had filed returns for 2000 and 2001 claiming losses carried forward from 1999 partnership items. *Id.* at 25a, 27a-28a. Rather, Krause argued that, regardless of the date of filing of a partner's individual return reporting items passed through to him from the partnership, 26 U.S.C. 6229(a) requires an FPAA to be issued within three years after the date the partnership return was filed. Pet. App. 6a-7a.

The Tax Court disagreed, relying on uniform authority holding that Section 6229(a) does not "provide[] an assessment period that is independent of the period described in [S]ection 6501." Pet. App. 27a (citing *Andantech L.L.C.* v. *Commissioner*, T.C. Memo 2002-97, aff'd in part, 331 F.3d 972 (D.C. Cir. 2003); *Rhone-Poulenc Surfactants & Specialties, L.P.* v. *Commissioner*, 114 T.C. 533, 540-551 (2000) (en banc),[3] appeal dismissed, 249 F.3d 175 (3d Cir. 2001)). The court held that, although the assessment period for 1999 had expired for all partners, the period was still open for 2000 and 2001. Pet. App. 27a-29a. The Tax Court also rejected Krause's argument that it lacked jurisdiction to consider the dates on which the partners had filed their individual returns, explaining that its authority to do so was implicit in *Rhone-Poulenc*. *Id.* at 34a n.4. Following that decision, Krause and the government stipulated to entry of a Tax Court decision conforming to the FPAA. *Curr-Spec Partners, LP* v. *Commissioner*, No. 1350-05 (May 28, 2008).

4. The court of appeals affirmed. Pet. App. 1a-22a. The court held that 26 U.S.C. 6229(a) does not establish an independent three-year limitations period within

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[3] For simplicity, we refer to decisions that were reviewed by the entire Tax Court as having been decided "en banc." See Pet. App. 13a n.2.

which an FPAA must be issued, but merely provides a minimum time period that may extend, but can never shorten, the three-year statute of limitations for assessments contained in 26 U.S.C. 6501(a). Pet. App. 6a-10a. The court of appeals further held that the Tax Court had jurisdiction pursuant to 26 U.S.C. 6226(d)(1) to consider whether the partners' individual assessment periods under Section 6501(a) remained open. Pet. App. 5a-6a, 16a nn.19 & 20.

ARGUMENT

The court of appeals held that 26 U.S.C. 6229(a) provides only a minimum period for assessing tax attributable to partnership items. Under that reading, Section 6229(a) can extend the limitations period provided in Section 6501(a) but can never shorten the period for an assessment of tax against an individual partner. That holding is correct and consistent with the holding of every other court of appeals to consider the issue, as well as with the interpretation of Section 6229(a) adopted by the Tax Court sitting en banc.

The court of appeals further held that, under 26 U.S.C. 6226(d), the Tax Court had jurisdiction in this partnership-level proceeding to determine whether the Section 6501(a) limitations period had expired as to Curr-Spec's partners' 2000 tax year and thereafter. That holding is also correct. And even if Curr-Spec's contrary interpretation of Section 6226(d) were well-founded, neither Curr-Spec nor the individual partners could derive any advantage from a decision of this Court so holding. To the contrary, this Court's adoption of that reading would require dismissal of the Tax Court petition, leaving the FPAA (and the partners' resultant

tax liabilities) undisturbed. Further review is not warranted.

A. Curr-Spec contends that 26 U.S.C. 6229(a) is a statute of limitations, and that the FPAA at issue in this case was untimely because it was issued more than three years after the filing of the partnership return for the taxable year 1999. See, *e.g.*, Pet. 8 (stating that "the Commissioner issued its FPAA purporting to change Curr-Spec's 1999 partnership tax return beyond the three-year period of 26 U.S.C. § 6229"). That reading of Section 6229(a) is incorrect and contrary to uniform appellate authority. Properly understood, Section 6229(a) can extend, but can never shorten, the limitations period (see 26 U.S.C. 6501(a)) for assessing an individual partner's tax.

1. As every court of appeals to consider the question (including the court below) has held, Section 6229(a) is not a statute of limitations. By its terms, Section 6229(a) provides only that the period for assessing tax attributable to partnership items "shall not expire before" three years from the date the partnership return is due or filed. Section 6229(a) identifies no point *after* which assessment becomes impermissible, and it therefore cannot have the effect of barring an assessment that would otherwise be timely. Rather, it operates under certain circumstances to extend the limitations period in Section 6501(a), which provides (with exceptions not applicable here) that "any tax" imposed by the Internal Revenue Code "shall be assessed within" three years after the filing of the individual's return. The cross-reference in Section 6501(n)(2)—which describes Section 6229 as an "extension of period"—confirms that understanding.

Thus, all taxes, including those arising from adjustments to partnership items, generally must be assessed against an individual partner within three years after the date he filed his individual return. Section 6229(a) provides, however, that the assessment period for taxes attributable to partnership items *cannot be less than* three years after the filing date of the partnership return. If a partnership return is filed later than an individual partner's return, Section 6229(a) extends the period for assessing tax against the individual partner until three years after the partnership return is filed. Taken together, Sections 6229(a) and 6501(a) ensure that the Service has at least three years to examine a partner's return *and* the underlying partnership return together before it must act to assess any additional tax against a partner.

2. Every court of appeals to consider the matter has agreed that Section 6229(a) does not create an independent limitations period, but rather can only extend the limitations period in Section 6501(a). See Pet. App. 2a, 14a nn.3 & 4; *AD Global Fund, LLC ex rel. North Hills Holding, Inc.* v. *United States*, 481 F.3d 1351, 1354-1355 (Fed. Cir. 2007); *Andantech L.L.C.* v. *Commissioner*, 331 F.3d 972, 976-977 (D.C. Cir. 2003); see also *Rhone-Poulenc Surfactants & Specialties, L.P.* v. *Commissioner*, 114 T.C. 533, 540-551 (2000) (en banc), appeal dismissed, 249 F.3d 175 (3d Cir. 2001).

None of the decisions cited by Curr-Spec or amicus SRK Wilshire Partners (SRK) holds otherwise. The court in one of those cases held that the challenged assessment was untimely under all of the relevant provisions. *Callaway* v. *Commissioner*, 231 F.3d 106 (2d Cir. 2000) (holding assessment untimely because all applicable limitations periods, including 26 U.S.C. 6501(a), had

expired). In other cases the courts held that the challenged assessments were timely under other provisions, and therefore had no occasion to consider whether Section 6229(a) could operate as an independent limitations bar under different circumstances. See *CC&F W. Operations Ltd. P'ship* v. *Commissioner*, 273 F.3d 402 (1st Cir. 2001) (holding assessment timely under extended limitations period of 26 U.S.C. 6229(c)(2)); *Madison Recycling Assocs.* v. *Commissioner*, 295 F.3d 280 (2d Cir. 2002) (holding assessment timely under agreed extension provision of 26 U.S.C. 6229(b)(1)); *Monetary II Ltd. P'ship* v. *Commissioner*, 47 F.3d 342, 343 (9th Cir. 1995) (same); *Anderson* v. *United States* (*In re Anderson*), No. 94-5165, 1995 WL 481196 (10th Cir. Aug. 8, 1995) (unpublished decision) (holding assessment timely under special limitations period of 26 U.S.C. 6229(f)), cert. denied, 516 U.S. 1119 (1996). Still other decisions mention Section 6229(a) only incidentally in the course of resolving unrelated issues. See, *e.g.*, *Monahan* v. *Commissioner*, 321 F.3d 1063 (11th Cir. 2003) (addressing effect of settlement agreement).

Thus, any fleeting suggestion in those cases that Section 6229(a) is a statute of limitations is dicta. Indeed, some of the circuits offering such dicta have, in later cases, recognized (again in dicta) that Section 6229(a) operates only to extend an otherwise applicable limitations period. See *Bakersfield Energy Partners, LP* v. *Commissioner*, 568 F.3d 767, 770 n.5 (9th Cir. 2009) (Section 6229(a) "provides a minimum time period in which the IRS can assess a tax deficiency," and thus is not an independent statute of limitations.); *Field* v. *United States*, 381 F.3d 109, 112 n.1 (2d Cir. 2004) ("[S]ection 6229(a), by its terms, does not purport to *limit* the time available to assess tax, but only to *extend*

limitations otherwise applicable."). Likewise, the court of appeals recognized in the decision below that its own comments about Section 6229(a) in prior cases had been dicta. See Pet. App. 11a-13a, 19a n.43 (dismissing as dicta characterizations of Section 6229(a) made in *Weiner* v. *United States*, 389 F.3d 152, 154-155 (5th Cir. 2004), cert. denied, 544 U.S. 1050 (2005), and *United States* v. *Martinez* (*In re Martinez*), 564 F.3d 719, 724, 726 (5th Cir. 2009)). Because every appellate court to interpret Section 6229(a) in its holding has correctly concluded that the provision is not a statute of limitations, further review is unwarranted.[4]

B. Curr-Spec contends that the Tax Court lacked jurisdiction in this partnership-level proceeding to consider the limitations issues in this case. That contention is not properly presented here because neither Curr-Spec nor the individual partners would obtain any tangible benefit if this Court agreed with Curr-Spec's jurisdictional argument. In any event, Curr-Spec's conten-

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[4] Amicus SRK also points (Br. 6) to informal advice from the Service's Chief Counsel, IRS CCA 200951035, 2009 WL 4884136 (June 24, 2009). Amicus misapprehends that advice. The actual advice, issued in response to an inquiry regarding partnership items in a tiered bankruptcy, consisted of only a simple statement ("There is no conversion."). The remainder of the text on Westlaw, beginning with "CHAPTER 21," was merely an attachment copied from a bankruptcy manual that predated the D.C. Circuit decision in *Andantech* in 2003. The out-of-date attachment is not the Service's official position on the statute of limitations in TEFRA proceedings (26 U.S.C. 6110(k)(3)), much less a "tentative rejection by the IRS of a position it has litigated and won in a series of cases," as amicus claims (Br. 6). See *Rhone-Poulenc*, 114 T.C. at 543; Chief Counsel Notice, IRS CCN N(35)000-154, 1998 WL 34358890 (Oct. 19, 1998) (revoking Litigation Guideline Memorandum, IRS LGM TL-43, 1988 WL 898060 (Jan. 22, 1988)); Litigation Guideline Memorandum, IRS LGM 199905040, 1999 WL 50721 (Feb. 5, 1999).

tion that the Tax Court lacked jurisdiction is contradicted by 26 U.S.C. 6226(d)(1), which expressly confers jurisdiction over the precise limitations issue presented here. Finally, even setting Section 6226(d)(1) aside, courts have long recognized that a limitations issue affecting all individual partners—like the argument Curr-Spec makes—is a partnership item over which the Tax Court has jurisdiction in a partnership-level proceeding.

1. Curr-Spec's central contention is that "TEFRA jurisdiction flowing from [Section] 6226(f) bars" "individual partner statutes of limitations under [Section] 6501(a) * * * from being litigated in Curr-Spec's partnership-level case below." Pet. 8. Even if that argument were legally sound, it would be entirely self-defeating, since it would mean that the Tax Court lacked jurisdiction to consider whether an assessment against any of the partners was time-barred. Because Krause conceded the FPAA's correctness in all other respects, the Tax Court would have been obliged to dismiss the petition Krause filed. And while Curr-Spec appears to assume that such a dismissal would have redounded to the partners' benefit, exactly the opposite is true: a dismissal would have left the FPAA undisturbed. See 26 U.S.C. 6226(h) ("If an action brought under this section is dismissed * * *, the decision of the court dismissing the action shall be considered as its decision that the [FPAA] is correct."). Thus, even if this Court accepted Curr-Spec's jurisdictional argument, it would not affect the outcome of the partnership-level proceeding.

2. In any event, the Tax Court did have jurisdiction to consider whether Curr-Spec's partners' individual assessment periods under Section 6501(a) remained open. If a given partner's assessment period had ex-

pired for all tax years, that partner would not have been a party to the Tax Court proceeding, and the FPAA would have been moot as to that partner. Section 6226 expressly contemplates, and authorizes the Tax Court to resolve, the question whether the period for assessing tax against a particular individual partner remains open.

As a baseline, Section 6226(c) provides that each person who was a partner during the partnership taxable year shall be treated as a party to the proceeding challenging the FPAA. That provision is then qualified by Section 6226(d)(1)(B), which states that a partner shall *not* be treated as a party after "the period within which any tax attributable to [the adjusted] partnership items may be assessed against that partner expire[s]." Thus, if the FPAA will not affect a particular partner because that partner has a limitations defense to any assessment arising from adjustments in the FPAA, that partner cannot challenge the FPAA. In order to invoke Section 6226(d)(1)(B), however, the individual partner must appear in the partnership-level proceeding, and the court in that proceeding has jurisdiction to decide whether the limitations period for assessing tax against him remains open. See 26 U.S.C. 6226(d)(1) (providing that such a person "shall be permitted to participate * * * solely for the purpose of asserting that the period of limitations for assessing any tax attributable to partnership items has expired with respect to such person, and the court having jurisdiction of such action shall have jurisdiction to consider such assertion"); Pet. App. 6a; *BLAK Invs.* v. *Commissioner*, 133 T.C. No. 19, 2009 WL 4981301, at *4-5 (Dec. 23, 2009); *G-5 Inv. P'ship* v. *Commissioner*, 128 T.C. 186, 190-192 (2007); *Kligfeld Holdings* v. *Commissioner*, 128 T.C. 192, 207 (2007). That grant of jurisdiction helps to prevent the waste of

limited judicial resources that could otherwise occur if the Tax Court decided the merits of an FPAA, only to find in subsequent partner-level proceedings (of which there could be many depending on the number of partners) that no tax could be assessed based on the adjustments in the FPAA.

Curr-Spec's assertion that the limitations period had expired as to all partners is clearly covered by Section 6226(d)(1). Curr-Spec's only response (Pet. 10) is that the Tax Court may exercise its jurisdiction under Section 6226(d)(1) only when a partner so requests. But Curr-Spec cites no authority for that one-sided reading, and the statutory text does not support it. Section 6226(d)(1) states that the court "shall have jurisdiction" to consider whether "the period within which any tax attributable to [the adjusted] partnership items may be assessed against that partner [has] expired." Moreover, Curr-Spec's interpretation of Section 6226(d)(1) would apparently permit a partner with no stake in the outcome of the partnership-level proceeding to elect to participate in it nevertheless. That would pose troubling standing questions for partnership-level proceedings in and appeals to Article III courts (where many such matters are heard, see 26 U.S.C. 6226(a)(2)-(3), (c) and (g), 7482). See *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975) ("[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction.") (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)).

3. Even setting Section 6226(d)(1) aside, a long line of cases establishes that the Tax Court had jurisdiction under 26 U.S.C. 6226(f) to decide Curr-Spec's statute-of-limitations argument. Section 6226(f) confers juris-

diction to determine all partnership items for the partnership taxable year to which the FPAA relates. Curr-Spec argues (Pet. 6-8) that the limitations issue here is not a "partnership item." But as Curr-Spec concedes, "eight and perhaps nine or ten Circuits * * * 'have reasoned that because the FPAA limitation issue affects the partnership as a whole,'" it "thus *is* a partnership item." Pet. 14 (emphasis added) (quoting *Weiner*, 389 F.3d at 156-157).

If it had been legally sound, the limitations defense that Curr-Spec asserted below—*i.e.*, that any assessments based on the FPAA in this case are barred by 26 U.S.C. 6229(a) because the FPAA was issued more than three years after the partnership return was filed—would have been a complete defense to the FPAA, applicable to all partners. That general applicability is the hallmark of a partnership item, and numerous courts have therefore treated similar limitations questions as partnership items. See *Keener* v. *United States*, 551 F.3d 1358, 1362-1364 (Fed. Cir.) (Section 6229(a)), cert. denied, 130 S. Ct. 153 (2009); *AD Global*, 481 F.3d 1351 (same); *Andantech*, 331 F.3d 972 (same); *Weiner*, 389 F.3d at 159 (same); see also *Davenport Recycling Assocs.* v. *Commissioner*, 220 F.3d 1255, 1259 & n.9 (11th Cir. 2000) (extension of limitations period as to all partners by agreement of tax management partner under 26 U.S.C. 6229(b)(1)(B)); *Kaplan* v. *United States*, 133 F.3d 469, 473 (7th Cir. 1998) (same); *Chimblo* v. *Commissioner*, 177 F.3d 119, 125 (2d Cir. 1999) (rejecting taxpayers' untimely attempt to "raise *the partnership's* statute of limitations defense") (emphasis added), cert. denied, 528 U.S. 1154 (2000).

Thus, contrary to amicus SRK's claim (Br. 8-10), the relevant appellate decisions uniformly treat limitations

questions like the one at issue here as partnership items. Conversely, amicus's discussion of "cases that considered whether nonpartnership items may be determined in a partnership proceeding," Br. 8, is simply irrelevant, since none of the published decisions amicus cites (see Br. 14-15) casts doubt on Section 6229(a)'s status as a partnership item.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2010

APPENDIX

1. 26 U.S.C. 6226 provides in pertinent part:

Judicial review of final partnership administrative adjustments

(a) Petition by tax matters partner

Within 90 days after the day on which a notice of a final partnership administrative adjustment is mailed to the tax matters partner, the tax matters partner may file a petition for a readjustment of the partnership items for such taxable year with—

(1) the Tax Court,

(2) the district court of the United States for the district in which the partnership's principal place of business is located, or

(3) the Court of Federal Claims.

(b) Petition by partner other than tax matters partner

(1) In general

If the tax matters partner does not file a readjustment petition under subsection (a) with respect to any final partnership administrative adjustment, any notice partner (and any 5-percent group) may, within 60 days after the close of the 90-day period set forth in subsection (a), file a petition for a readjustment of the partnership items for the taxable year involved with any of the courts described in subsection (a).

(2) Priority of the Tax Court action

If more than 1 action is brought under paragraph (1) with respect to any partnership for any partnership taxable year, the first such action brought in the Tax Court shall go forward.

(3) Priority outside the Tax Court

If more than 1 action is brought under paragraph (1) with respect to any partnership for any taxable year but no such action is brought in the Tax Court, the first such action brought shall go forward.

(4) Dismissal of other actions

If an action is brought under paragraph (1) in addition to the action which goes forward under paragraph (2) or (3), such action shall be dismissed.

(5) Treatment of premature petitions

If—

(A) a petition for a readjustment of partnership items for the taxable year involved is filed by a notice partner (or a 5-percent group) during the 90-day period described in subsection (a), and

(B) no action is brought under paragraph (1) during the 60-day period described therein with respect to such taxable year which is not dismissed,

such petition shall be treated for purposes of paragraph (1) as filed on the last day of such 60-day period.

(6) Tax matters partner may intervene

The tax matters partner may intervene in any action brought under this subsection.

(c) Partners treated as parties

If an action is brought under subsection (a) or (b) with respect to a partnership for any partnership taxable year—

(1) each person who was a partner in such partnership at any time during such year shall be treated as a party to such action, and

(2) the court having jurisdiction of such action shall allow each such person to participate in the action.

(d) Partner must have interest in outcome

(1) In order to be party to action

Subsection (c) shall not apply to a partner after the day on which—

(A) the partnership items of such partner for the partnership taxable year became nonpartnership items by reason of 1 or more of the events described in subsection (b) of section 6231, or

(B) the period within which any tax attributable to such partnership items may be assessed against that partner expired.

Notwithstanding subparagraph (B), any person treated under subsection (c) as a party to an action shall be permitted to participate in such action (or file a readjustment petition under subsection (b) or paragraph (2) of this subsection) solely for the pur-

pose of asserting that the period of limitations for assessing any tax attributable to partnership items has expired with respect to such person, and the court having jurisdiction of such action shall have jurisdiction to consider such assertion.

(2) To file petition

No partner may file a readjustment petition under subsection (b) unless such partner would (after the application of paragraph (1) of this subsection) be treated as a party to the proceeding.

* * * * *

(f) Scope of judicial review

A court with which a petition is filed in accordance with this section shall have jurisdiction to determine all partnership items of the partnership for the partnership taxable year to which the notice of final partnership administrative adjustment relates, the proper allocation of such items among the partners, and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item.

(g) Determination of court reviewable

Any determination by a court under this section shall have the force and effect of a decision of the Tax Court or a final judgment or decree of the district court or the Court of Federal Claims, as the case may be, and shall be reviewable as such. With respect to the partnership, only the tax matters partner, a notice partner, or a 5-percent group may seek review of a determination by a court under this section.

(h) Effect of decision dismissing action

If an action brought under this section is dismissed (other than under paragraph (4) of subsection (b)), the decision of the court dismissing the action shall be considered as its decision that the notice of final partnership administrative adjustment is correct, and an appropriate order shall be entered in the records of the court.

2. 26 U.S.C. 6229 provides in pertinent part:

Period of limitations for making assessments

(a) General rule

Except as otherwise provided in this section, the period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the later of—

(1) the date on which the partnership return for such taxable year was filed, or

(2) the last day for filing such return for such year (determined without regard to extensions).

(b) Extension by agreement

(1) In general

The period described in subsection (a) (including an extension period under this subsection) may be extended—

(A) with respect to any partner, by an agreement entered into by the Secretary and such partner, and

(B) with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement),

before the expiration of such period.

* * * * *

(c) Special rule in case of fraud, etc.

(1) False return

If any partner has, with the intent to evade tax, signed or participated directly or indirectly in the preparation of a partnership return which includes a false or fraudulent item—

(A) in the case of partners so signing or participating in the preparation of the return, any tax imposed by subtitle A which is attributable to any partnership item (or affected item) for the partnership taxable year to which the return relates may be assessed at any time, and

(B) in the case of all other partners, subsection (a) shall be applied with respect to such return by substituting "6 years" for "3 years".

(2) Substantial omission of income

If any partnership omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in

its return, subsection (a) shall be applied by substituting "6 years" for "3 years".

* * * * *

3. 26 U.S.C. 6231 provides in pertinent part:

Definitions and special rules

(a) Definitions

For purposes of this subchapter—

* * * * *

(3) Partnership item

The term "partnership item" means, with respect to a partnership, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level.

(4) Nonpartnership item

The term "nonpartnership item" means an item which is (or is treated as) not a partnership item.

(5) Affected item

The term "affected item" means any item to the extent such item is affected by a partnership item.

(6) Computational adjustment

The term "computational adjustment" means the change in the tax liability of a partner which properly reflects the treatment under this subchapter of a partnership item. All adjustments required to apply the results of a proceeding with respect to a partnership under this subchapter to an indirect partner shall be treated as computational adjustments.

* * * * *

4. 26 U.S.C. 6501 provides in pertinent part:

Limitations on assessment and collection

(a) General rule

Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

* * * * *

(c) Exceptions

(1) False return

In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) Willful attempt to evade tax

In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) No return

In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(4) Extension by agreement

(A) In general

Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(B) Notice to taxpayer of right to refuse or limit extension

The Secretary shall notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent.

* * * * *

(n) Cross references

* * * * *

(2) For extension of period in the case of partnership items (as defined in section 6231(a)(3)), see section 6229.

* * * * *

Supreme Court, U.S.
FILED
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(4)

No. 09-871

IN THE

Supreme Court of the United States

CURR-SPEC PARTNERS, L.P., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

This case involves an erroneous rule of law that violates U.S. Const. art. 1, § 8 and art. III, § 2. First adopted by the Tax Court in a case known as *Rhone-Poulenc*,[1] the D.C. and Federal Circuits[2] adopted this erroneous rule before its adoption by the Fifth Circuit below and widening a split with an increasing number of other circuit courts. Illustrating the fallacy of the *Rhone-Poulenc* reasoning requires familiarity with Congress' tax assessment procedure attributable to partnership items.

A. Tax Assessment Procedure on Partnership Items, including Limitations

Like all other returns, Congress gave the IRS three years to change a partnership tax return with 26 U.S.C. 6229(a). If the IRS issues a final partnership administrative adjustment (an "FPAA") changing a partnership's tax return, 26 U.S.C. 6229(d) suspends the three-year § 6229(a) period during the time "which an action may be brought under section 6226 [i.e., a partnership-level case]...and for one year thereafter."[3] Properly understood, the limitation for assessing tax on partnership items is never less than the three-year period of § 6229(a) which § 6229(d) extends with a timely FPAA and, during that extended period, tax

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[1] *Rhone-Poulenc Surfactants & Specialties, L.P. v. Comm'r*, 114 T.C. 533 (2000), *appeal dismissed and remanded*, 249 F.3d 175 (3d Cir. 2001).

[2] *Andantech L.L.C. v. Comm'r*, 331 F.3d 972 (D.C. Cir. 2003); *AD Global Fund, LLC v. United States*, 481 F.3d 1351 (Fed. Cir. 2007).

[3] 26 U.S.C. 6229(d).

must assessed against partners on their partnership items.

Because § 6229(d) requires the IRS to issue an FPAA to extend the three-year assessment period of § 6229(a), assessment must be put on hold to give the partnership a chance to respond, hence an extension. No assessment of tax on a partnership item may occur until 150 days after the date of either the IRS' FPAA or a final Tax Court decision, if a § 6226 partnership-level case is brought there.[4] However, "[o]nce partnership-level proceedings are completed, [the IRS] is permitted to assess a 'computational adjustment' [*i.e.*, tax from a partnership item] against a partner without issuing a deficiency notice."[5] The obvious consequence of failing to issue an FPAA during the three-year § 6229(a) assessment period is no tax assessment on partnership items, as is failing to assess tax prior to the end of the assessment period, as extended.

The § 6229(a) period may be extended by agreement either by the partnership as to all partners[6] or by an individual partner as to him alone.[7] The § 6229(a) period also extends as to an individual partner who separately settles[8] with the IRS, or files

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[4] 26 U.S.C. 6225(a).

[5] 26 U.S.C. 6230 (a)(1); *Crowell v. Comm'r*, 102 T.C. 683, 689 (1994). The term "computational adjustment" means the change in the tax liability of a partner which properly reflects the treatment under this subchapter of a partnership item. 26 U.S.C. 6231(a)(6).

[6] 26 U.S.C. 6229(c)(1)(B).

[7] 26 U.S.C. 6229(c)(1)(A).

[8] 26 U.S.C. 6229(f); 26 U.S.C. 6231(b)(1)(C).

bankruptcy.[9] In 1997, Congress recognized that the periods for assessing tax against individual partners may vary from partner to partner but that such partner would not have standing to assert his limitations defense in a partnership-level case. Consequently, it enacted what is now the last sentence § 6226(d)(1)(B) giving standing rights to individual partners (as opposed to the government), to bring that issue to the court's attention.

B. Jurisdiction and Standing in Partnership-Level Cases

Congress requires that "[t]he tax treatment of any partnership item...shall be determined at the partnership level"[10] and strictly limits the jurisdiction of a court hearing a partnership-level case to "all partnership items of the partnership for the partnership taxable year to which the [FPPA] relates...".[11] To satisfy due process concerns, Congress enacted § 6226(c), which treats every partner as a party to a partnership-level case, and expressly allows them to participate, in order to ensure they have a stake in the outcome thereby binding them to the resulting decision.[12] To reiterate standing, or rather the lack of standing, § 6226(d)(1)(B) denies the standing granted by § 6226(c) to partners whose limitations on assessment have expired. However, none of those provisions relax the partnership-only jurisdictional

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[9] 26 U.S.C. 6229(h).

[10] 26 U.S.C. 6221.

[11] 26 U.S.C. 6226(f).

[12] 26 U.S.C. 6226(c).

scope of a partnership-level case. And neither did Congress' 1997 amendment of § 6226(d) added by the Taxpayer Relief Act of 1997.[13]

In 1997, Congress recognized that the period for assessing tax against individual partners may vary. By adding what is now the last sentence of § 6226(d)(1)(B), Congress specifically grants an individual partner limited purpose standing to intervene in a partnership proceeding solely to assert his individual limitations defense. While the plain meaning of that sentence grants limited-purpose standing to a partner invoking this provision by making a filing to participate, the Tax Court [14] and the court of appeals, interpret this language as a general exception to § 6226(f) for the government to allege its own facts as to individual partners. Pet. App. 6a. On this point, the Fifth Circuit stands alone with the Tax Court.

C. Curr-Spec's Motions in the Tax Court and Its Decisions

Several misstatements of fact and law made in the Commissioner's Brief in Opposition require addressing. The factual misstatements focus on Curr-Spec's contentions in this appeal and its posture in Tax Court and its misstatement of law relates to misapprehending the result if the courts below had not erred.

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[13] Pub.L. 105-34, sec. 1239(b), 111 Stat. 1027-1028.

[14] *PCMG Trading Partners XX v. Comm'r*, 131 T.C. ___, ___ (2008) (slip op. at n.9) (2008).

Curr-Spec premised its FPAA statute of limitation defense on the Tax Court's jurisdiction to decide that issue. The Commissioner responded by asking the Tax Court to decide that issue based instead on individual partner limitations under § 6501(a) relying on facts relating to individual partner tax returns. Contrary to the Commissioner's characterization of Curr-Spec's jurisdictional plea as to the entire limitations issue, Re. Opp. 10-11, Curr-Spec asked the Tax Court to strike only the Commissioner's improper allegation on jurisdictional grounds.

The Commissioner misstates the law and contradicts himself by claiming that even if Curr-Spec is right it gains no benefit because the case would be dismissed resulting in affirming the FPAA's adjustments. Res. Opp. 10-12. The remedy sought by Curr-Spec for the untimely FPAA is "that the [Tax] Court enter a decision...that the adjustment of partnership items determined by respondent['s FPAA] is disallowed" because an "order simply dismissing the action would impermissibly bring section 6226 (h) into play,"[15] as the Commissioner argues. Res. Opp. 10-12. If the Tax Court had based the decision solely on the partnership's tax return filing date, the result would be "a complete defense to the FPAA, applicable to all partners"[16] thereby barring assessment against the

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[15] *Columbia Building, Ltd. v. Comm'r*, 98 T.C. 607, 612 (1992).

[16] This correct understanding of the Commissioner contradicts his contentions elsewhere in his Brief in Opposition that "neither Curr-Spec nor the individual partners would obtain any tangible benefit if this Court were to agree with Curr-Spec's jurisdictional argument." Res. Opp. 10. He reiterated the contention: "even if this Court accepted Curr-Spec's jurisdictional argument, it would

partners for additional tax from partnership items. Res. Opp. 14.

This Court should issue a writ of certiorari for three reasons: first, to correct the erroneous rule of law that improperly expands jurisdiction by judicial interpretation; second, to resolve an uneven split between the large majority of circuit courts that properly require jurisdiction be taken into account in deciding partnership limitations and those few that improperly ignore jurisdiction (see Pet. App. 12-15); and, third, to address the "heads government wins, tails taxpayer loses" result from the selective enforcement of TEFRA jurisdiction. Each year over 3 million entities file partnership returns and their partners, the taxpayers, deserve enforcement of the law as enacted by Congress.

POINTS IN REPLY

The Commissioner's opposition vividly illustrates the flawed use of statutory construction in his limitations analysis, which neglects Congress' statutes to achieve a desired result. The Commissioner also attempts to force a camel through the eye of a needle by arguing, as did the court of appeals, that a special standing provision granted by Congress to individual partners empowers the Tax Court to ignore § 6226(f) in favor of the government.

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not affect the outcome of the partnership-level proceeding." Res. Opp. 11.

A. Jurisdictional Expansion by a Statutory Construction that Ignores both Jurisdiction and the Balance of the Code Section being Interpreted

The court of appeals held that 26 U.S.C. § 6229(a) does not establish an independent three-year statute of limitations within which an FPAA must be issued, but merely provides a minimum time period that may be extended, but can never shorten, the three-year statute of limitations for assessments contained in 26 U.S.C. 6501(a). Res. Op. 5-6; Pet. App. 6a-10a. This decision purports to decide the "interplay" between those two Code sections but violates one of the most fundamental canons of statutory construction. *See Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). Those courts err by amputating § 6229(a) from the rest of § 6229 for rigorous analysis and ignoring the rest of that section. The Commissioner reiterates this by writing, at Res. Opp. 7, that "Section 6229(a) identifies no point *after* which assessment becomes impermissible" but ignores § 6229(d), which identifies that very end point if § 6229 is read as a whole.

Congress enacted § 6229, entitled "Period of limitations for making assessments," as a whole to serve as the exclusive statute of limitation for assessing tax from partnership items. It took every opportunity to direct a reader of the Internal Revenue Code to TEFRA in general for tax from partnership items and to § 6229 in particular for limitations on assessments for

partnership items. *See* 26 U.S.C. 6504 ("For limitation period in case of—(11) Assessments of tax attributable to partnership items, see section 6229.") *See also* 26 U.S.C. 6216(4) ("For procedure relating to partnership items, see subchapter C" referring to §§ 6221—6234.); and 26 U.S.C. 6501(n)(2) ("For extension of period in the case of partnership items (as defined in section 6231 (a)(3), see section 6229.").[17]

The Commissioner attempts to distinguish Curr-Spec's cited authority by writing that "[i]n other cases the courts held that the challenged assessments were timely under other provisions..." than § 6229(a). Res. Opp. 9. However, in every case the Commissioner cites in that paragraph, the assessment was timely under some other subsection of § 6229—inadvertently corroborating § 6229 as a whole as the applicable statute of limitation—and none relied on § 6501(a).

Besides ignoring the whole of Congress' Code section and all of its directional indicators pointing to § 6229, the court of appeal's "interplay" argument stands in stark contrast to all courts of appeal that understand the deficiency procedures for partnership items are mutually exclusive to the deficiency procedures for everything else. Properly understood, for tax attributable to "those items [] classified as partnership items, subchapter C [TEFRA] would apply. ...If those items were classified as

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[17] *See also* 26 U.S.C. 6503(a)(1) ("General Rule: The running of the period of limitations provided in section 6501 or 6502 (or section 6229, but only with respect to a deficiency described in paragraph (2)(A) or (3) of section 6230 (a)) on the making of assessments...shall...be suspended...") (*emphasis added*).

nonpartnership items, then subchapter C could not apply."[18] Moreover, and more specifically, § 6501(a) applies not at all in partnership-level cases.[19]

Lastly, if the "interplay" theory were legally sound it would reconcile with the jurisdictional limits Congress imposed on courts hearing TEFRA partnership-level cases which, generally, must be a partnership item mentioned in the FPAA.[20] None of the court of appeal decisions the Commissioner touts as having adopted the "interplay" theory, Res. Opp. 7, make even a fleeting suggestion that individual partner statute of limitations under § 6501(a) are valid partnership items permitted by § 6226(f). It is the height of sophistry for any party to contend that the secret "interplay" between of § 6229(a) and § 6501(a) remained hidden until discovered in 2000, by a portion of the Tax Court in *Rhone-Poulenc*, over the sharp dissent of six of its more senior judges.

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[18] *Callaway v. Commissioner*, 231 F.3d 106, 117-118 (2d Cir. 2000); *also see Olson v. United States*, 172 F.3d 1311, 1317 (Fed. Cir. 1999) ("Tax adjustments based upon an 'overpayment attributable to a partnership item (or an affected item)' are not subject to the 'standard' deficiency procedures.")

[19] *Boyd v. Comm'r*, 101 T.C. 365, 370 (1993) ("However, section 6501(a) does not apply to income tax attributable to partnership items. Sec. 6501(o)."); *Cambridge Research & Dev. Group v. Comm'r*, 97 T.C. 287, 292 (1991) ("The general rule of section 6501 (a) does not apply, however, to income tax attributable to partnership items. Sec. 6501 (o)(2), formerly sec. 6501 (n)(2)."). These decisions were rendered much closer in time to Congress' enactment of TEFRA.

[20] The FPAA issued to Curr-Spec mentioned nothing about individual partner tax return filing dates or § 6501(a).

B. Jurisdictional Expansion by Interpreting a Standing Provision, Granted to a Taxpayer/Partner, into a Grant of Jurisdiction to the Government

The court of appeals further held that the Tax Court had jurisdiction pursuant to 26 U.S.C. 6226(d)(1) to consider whether the partners' individual assessment periods under § 6501(a) remained open. Res. Opp. 6; Pet. App. 5a-6a, 16a nn.19 & 20. This is made necessary because individual partners' assessment periods under § 6501(a) cannot, under any plausible theory, square with the jurisdictional limits of § 6226(f). This is the classic case of fitting a round peg into a square hole.

On this point, the Commissioner defends with three arguments: that the FPAA limitations as to the whole partnership is a partnership item, that the issue is not properly presented, and that, in any event, § 6226(d)(1) grants the Tax Court jurisdiction to decide the limitations issue, as to the entire partnership. Regarding the first issue, the parties agree with Curr-Spec's argument in every court in this case that the FPAA limitations are a partnership item.

As to the second contention, Curr-Spec addressed in I.C. *infra* above the Commissioner's misapprehension concerning the Tax Court's jurisdiction to decide the partnership limitations issue, just not based on nonpartnership matters, and his misapprehension concerning the benefit of a correct ruling. Curiously, the Commissioner's misapprehension is only intermittent as elsewhere in his brief, the Commissioner concurs that if FPAA limitations are

determined by the filing date of Curr-Spec's tax return, its limitations defense "would be a complete defense to the FPAA, applicable to all partners." Res. Opp. 14. That is correct, meaning that the FPAA was too late to change Curr-Spec's return as filed, and that the return as filed is final resulting in no increase in tax.[21]

The court of appeal's contention that § 6226(d)(1) grants the Tax Court jurisdiction to decide the partnership's FPAA limitations defense based solely on individual partner limitations might be legally sound if based solely on that portion of the statute the Commissioner quotes. Res. Opp. 11. The Commissioner's selective reading—completely reading out Congress' references to an individual partner who would not have standing to intervene to assert his limitations defense—appears to imply a general grant of jurisdiction. *Id.* The Commissioner's brief omits the language from the last sentence § 6226(d)(1): "Notwithstanding... participate in such action" referring to the party may invoke jurisdiction.

There is not the faintest suggestion that Congress intended to refer to the government as a person who "shall be permitted to participate...solely for the purpose of asserting [a limitations defense] with respect to such person...". The House report explaining the law that existed before the 1997 amendment, reproduced in the Appendix, confirms this. Section 6226(d)(1) grants standing only to an individual partner—and no individual partner intervened in the Tax Court and both courts below determined that

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[21] *Roberts v. Comm'r*, 94 T.C. 853, 857 (1990); *Ginsburg* v. *Comm'r*, 127 T.C. 75, 80 (2006).

Curr-Spec brought its petition under § 6226(a) on behalf of all partners. Pet. App. 2a & 24a. By attempting to find jurisdiction in § 6226(d)(1) for the Tax Court's decision, the court of appeals commits the sin of *Rhone-Poulenc* by improperly expanding jurisdiction through judicial interpretation, for the government's benefit.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeal for the Fifth Circuit.

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APPENDIX

1. 26 U.S.C. 6229 provides in pertinent part:

Period of limitations for making assessments

(a) General rule

Except as otherwise provided in this section, the period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the later of—

(1) the date on which the partnership return for such taxable year was filed, or

(2) the last day for filing such return for such year (determined without regard to extensions).

* * * * *

(d) Suspension when Secretary makes administrative adjustment

If notice of a final partnership administrative adjustment with respect to any taxable year is mailed to the tax matters partner, the running of the period specified in subsection (a) (as modified by other provisions of this section) shall be suspended—

(1) for the period during which an action may be brought under section 6226 (and, if a petition is filed under section 6226 with respect to such administrative adjustment, until the decision of the court becomes final), and

(2) for 1 year thereafter.

* * * * *

2. 26 U.S.C. 6226 provides in pertinent part:

(c) Partners treated as parties

If an action is brought under subsection (a) or (b) with respect to a partnership for any partnership taxable year—

(1) each person who was a partner in such partnership at any time during such year shall be treated as a party to such action, and

(2) the court having jurisdiction of such action shall allow each such person to participate in the action.

(d) Partner must have interest in outcome

(1) In order to be party to action

Subsection (c) shall not apply to a partner after the day on which—

(A) the partnership items of such partner for the partnership taxable year became nonpartnership items by reason of 1 or more of the events described in subsection (b) of section 6231, or

(B) the period within which any tax attributable to such partnership items may be assessed against that partner expired.

Notwithstanding subparagraph (B), any person treated under subsection (c) as a party to an action shall be permitted to participate in such action (or file a readjustment petition under subsection (b) or paragraph (2) of this subsection) solely for the purpose of asserting

that the period of limitations for assessing any tax attributable to partnership items has expired with respect to such person, and the court having jurisdiction of such action shall have jurisdiction to consider such assertion.

(2) To file petition

No partner may file a readjustment petition under subsection (b) unless such partner would (after the application of paragraph (1) of this subsection) be treated as a party to the proceeding.

* * * * *

3. Excerpt of H. Rept. 105-148, at 594 (1997), 1997-4 C.B. (Vol. 1) 319, 916.

For a partner other than the Tax Matters Partner to be eligible to file a petition for redetermination of partnership items in any court or to participate in an existing case, the period for assessing any tax attributable to the partnership items of that partner must not have expired. Since such a partner would only be treated as a party to the action if the statute of limitations with respect to them was still open, the law is unclear whether the partner would have standing to assert that the statute of limitations had expired with respect to them. []

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No. 09-871

In The
Supreme Court of the United States

CURR-SPEC PARTNERS, L.P.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF SRK WILSHIRE PARTNERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This brief addresses the question that undermines, if not destroys, the partnership/partner distinction on which every Unified Partnership Proceeding depends:

> The Unified Partnership Proceedings (26 U.S.C. §§ 6221-6234) require that all partnership items be determined in a streamlined single partnership proceeding, with the varying partner-specific affected items deferred to subsequent partner-level proceedings, thus ensuring the consistent tax treatment of all partners in a given partnership. In *Weiner v. United States*, 389 F.3d 152, 156-57 (5th Cir. 2004), the Fifth Circuit found that the separate partnership limitations of Section 6229 was a partnership item that could not be raised in the partner-level refund case "because the FPAA limitations issue affects the partnership as a whole . . . ." Five years later, in *Curr-Spec Partners, L.P. v. Commissioner*, 579 F.3d 391 (5th Cir. 2009), that same court held that the partnership limitations period varied between partners depending upon their partner-specific facts, such as when they filed their individual returns. By basing the partnership limitations period on the varying individual partners' limitations periods, did *Curr-Spec* misstate the rule of law under Section 6226(f), which limits partnership proceedings to the determination of "partnership items"?

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INTEREST OF AMICUS CURIAE[1]

SRK Wilshire Partners ("SRK") is one of thousands of partnerships facing the jurisdictional quagmire in partnership proceedings under 26 U.S.C. §§ 6221-6234[2] ("Unified Partnership Proceedings").[3] SRK is pressing such a "TEFRA" partnership proceeding in the United States Tax Court, Docket No. 29903-08. Like virtually all TEFRA partnerships involved in Unified Partnership Proceedings, SRK faces wasting the resources of the trial court, the Internal Revenue Service ("IRS"), and itself in litigating issues over which partnership jurisdiction may or may not exist. On behalf of itself and those similarly situated, SRK files this *amicus* brief encouraging the Court to grant the writ of certiorari sought by *Curr-Spec*.

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[1] Counsel of record for all parties consent to the filing of this *amicus* brief. Counsel either received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief or Counsel waived their right to receive at least 10 days notice. The parties' consent to the filing of this brief and the 10-day waivers of notice (where applicable) are being filed concurrently with this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution of any sort. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] Unless otherwise indicated, "Section" references are to 26 U.S.C., the Internal Revenue Code of 1986 (as amended).

[3] The Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") added the relevant sections to the Internal Revenue Code that apply only to partnerships. These partnership provisions are commonly referred to by the acronym, "TEFRA."

INTRODUCTION AND SUMMARY OF ARGUMENT

SRK asks the Court to consider the following two points in deciding whether to grant the writ of certiorari:

1. *Curr-Spec* personifies the problem that continues to disrupt the jurisdiction of virtually every Unified Partnership Proceeding in the country, as a recent opinion by the United States Court of Appeals for the D.C. Circuit confirms. Contrary to the statutory scheme designed to ensure consistent treatment of all partners in a given partnership, *Curr-Spec* promotes inconsistent treatment by prescribing the partnership treatment based on the varying circumstances of different partners, such as when a given partner filed his or her individual return. That destroys the mechanism Congress enacted to promote consistency through Sections 6221[4] and 6226(f):[5] a single separate

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[4] Section 6221 provides:

> Except as otherwise provided in this subchapter, the tax treatment of any partnership item . . . shall be determined at the partnership level.

[5] Section 6226(f) states:

> SCOPE OF JUDICIAL REVIEW. – A court with which a petition is filed in accordance with this section shall have jurisdiction to determine all partnership items of the partnership for the partnership taxable year to which the notice of final partnership administrative adjustment relates, the proper allocation of such items among the

partnership proceeding to render one consistent result for the partnership as a whole, followed by separate partner-level proceedings to address their respective varying circumstances. *Curr-Spec* eliminates the dividing line.

2. Over three million private companies conduct their business through limited liability companies, limited partnerships, general partnerships, and the recent trend of limited liability partnerships which file U.S. partnership returns.[6] Sections 6221-6234 subject the overwhelming majority of those businesses to the Unified Partnership Proceedings. By crossing the partnership versus partner dividing line between partnership proceedings and the subsequent partner-level affected item proceedings, *Curr-Spec* and a handful of other cases create potential jurisdictional disputes for virtually every business subject to the Unified Partnership Proceedings.

By comparison to petitioner's brief, this brief focuses upon the broader impact of altering uniform partnership determinations based on varying partner-

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partners, and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item.

[6] According to the IRS Commissioner Annual Report for the most recent reported period, the IRS received 3,307,000 partnership returns for 2008 alone. IRS Data Book Table 2, Number of Returns Filed, by Type of Return, Fiscal Years 2007 and 2008, http://www.irs.gov/pub/irs-soi/08db02nr.xls.

specific facts and the negative reaction by partnership taxation treatises and commentators.

For almost 20 years, taxpayers and the government relied on Section 6229 as the exclusive statute of limitations for partnership items. *See* William S. McKee et al., *Federal Taxation of Partnerships and Partners* ¶ 10.06[2], at 10-51 (3d ed. 2004). All parties understood that the Section 6501 statute of limitations applied exclusively to individuals and entities other than partnerships governed by the Uniform Partnership Procedures. This separation of Section 6229 from Section 6501 advanced the equal and identical treatment of all partners through one partnership level proceeding. It also mirrored the jurisdictional bar embraced in refund litigation that prohibited a court from examining the partnership statute of limitations in an individual partner refund proceeding, exemplified by *Weiner*, 389 F.3d 152. And it harmonized with the majority of cases that respected the jurisdictional limitation established by Section 6226(f), that elements of an individual partner's return could not be considered in a partnership proceeding. *E.g., Petaluma FX Partners, LLC v. Commissioner*, 591 F.3d 649 (D.C. Cir. 2010).

When the IRS let a partnership statute of limitations expire, the IRS asserted a novel theory. In *Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner*, 114 T.C. 533 (2000), the IRS argued that the partnership Section 6229 limitations statute was only a minimum period and that Section 6501 was the controlling statute for individuals and all entities (including partnerships). Without examining the jurisdictional restraint of Section 6226(f) that limits partnership level litigation to "partnership items," the

Tax Court in *Rhone-Poulenc*[7] adopted the argument of the IRS, and in so doing, rent the fabric of the Unified Partnership Proceedings.

The prospect that an open statute of limitations for one partner could force open the limitations of a partnership (and either ensure inconsistent treatment of the partners or open the partnership period for all other partners) was the most startling implication of that novel reasoning. In an effort to protect the IRS from a partner who does not file his own tax return, the courts foisted uncertainty on all partners in all partnerships forever. Consider this colloquy between the Tax Court and IRS counsel in a subsequent case:

> At the hearing on the motion, the Commissioner's counsel took an extreme view of the application of *Rhone-Poulenc*:
>
> > The Court: The Kligfelds, they take the life-enhancing serum, they don't get rid of their distributed partnership property until 2100. They got the property in 1999. The IRS says inflated basis, partnership item, we're going to issue an FPAA for 1999, even though now its January of 2100. Kosher?
> >
> > IRS Counsel: Yes, I believe that is the case, your Honor.

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[7] *GAF Corp. v. Commissioner*, 114 T.C. 519, 521 (2000) was a companion case to *Rhone-Poulenc*.

Kligfeld Holdings v. Commissioner, 128 T.C. 192, 203 n.20 (2007). That is, one partner's actions can keep the partnership period open 101 years.

The IRS itself publicly admits that it only advances the overlapping statute theory of Section 6229 (partnership) with Section 6501 (individual) as an expedient litigating position and that the separate partnership statute of limitations set out in Section 6229 should generally be relied on (unless that is inconvenient). In a recent Internal Revenue Service Chief Counsel Advice, the IRS took this position:

> In Rhone-Poulenc v. Commissioner, 114 T.C. 533 (2000) the Tax Court held that, rather than providing a separate statute for partnership items, section 6229 extends the period of limitations under section 6501. For protective purposes, however, the Service will continue to treat section 6229 as a separate statute of limitations for assessment from section 6501.

IRS CCA 200951035, 2009 WL 4884136. That CCA explained that where the partnership limitations under Section 6229 had already expired, but the nonpartnership statute under Section 6501 remained open for one or more partners, "we will consider arguing the 'statute extension' approach on a case-by-case basis." *Id.* The tentative rejection by the IRS of a position it has litigated and won in a series of cases[8] is understandable only if the IRS knows it to be wrong.

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[8] *AD Global Fund, LLC v. United States*, 67 Fed.Cl. 657, 662 (Fed. Cl. 2005), *aff'd*, 481 F.3d 1351 (Fed. Cir. 2007); *Andantech LLC v. Commissioner*, 331 F.3d 972, 975 (D.C. Cir. 2003).

ARGUMENT

I. *CURR-SPEC* SHOULD BE REVERSED BECAUSE IT CONFLICTS WITH ALL OTHER LINES OF CASES HOLDING THAT THE JURISDICTIONAL BAR OF SECTION 6226(f) PREVENTS ELEMENTS OF AN INDIVIDUAL PARTNER'S TAX RETURN FROM BEING CONSIDERED IN A PARTNERSHIP PROCEEDING.

The cornerstone of any court opinion, whether written or unwritten, is that court's right to deliver the opinion. Without jurisdiction, the reasoning and ultimate holding amounts to little more than an advisory opinion carrying no force of law. This Court has long expressed its disproval of such a practice, saying "the statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101 (1998). The Tax Court has also declined to presume jurisdiction in order to reach the merits of a party's claim. Citing *Steel Co.*, the Tax Court noted, "[w]e cannot avoid the jurisdictional issue by assuming hypothetical jurisdiction and disposing of the case on the merits." *Blonien v. Commissioner,* 118 T.C. 541, 551 (2002). *Curr-Spec* erred in assuming hypothetical jurisdiction over an individual partner's statute of limitations.

At least three lines of cases have developed independently, generally without recognition that their respective approaches to jurisdiction clash: (i) the

Rhone-Poulenc notice of partnership adjustment[9] line of statute of limitations cases, of which *Curr-Spec* is the latest; (ii) the *Weiner* refund[10] line of statute of limitations cases, of which *Keener v. United States*, 551 F.3d 1358, 1362-63 (Fed. Cir.), *cert. denied*, 130 S.Ct 153 (2009) is the latest; and (iii) multiple strands of cases that considered whether nonpartnership items may be determined in a partnership proceeding, with the D.C. Circuit's decision in *Petaluma* being not only the latest, but the clearest in approach to the jurisdictional question of whether a court may examine elements of an individual partner's tax return to reach a decision in that partnership proceeding.

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[9] A notice of final partnership administrative adjustment, commonly referred to as an "FPAA" is issued to a partnership at the conclusion of an audit. It is a necessary prerequisite generally to partnership litigation. Section 6226(a).

[10] A refund suit may be brought by an individual or an entity on behalf of itself under Section 7422. These suits are distinct from partnership proceedings and must not involve "partnership items." Section 7422(h).

A. By Ignoring The Jurisdictional Restraint of Section 6226(f) In *Curr-Spec*, The Fifth Circuit Misstated The Rule Of Law And Clashed With Refund Cases Of Its Own And Of Other Circuits.

Five years after drawing a sharp line between partnership and nonpartnership items in *Weiner*, the Fifth Circuit obliterated any distinction in *Curr-Spec*. Because the *Curr-Spec* and the *Weiner* lines of cases addressed the same subject matter jurisdiction rule but reached diametrically opposed conclusions, one of the two has misstated the rule of law. For reasons stated herein, that case is *Curr-Spec*.[11]

By way of background, before the Fifth Circuit decided *Weiner*, the United States District Court for the Southern District of Texas wrestled with two cases concerning the jurisdictional limits of refund actions. In *Kraemer*, the court determined, in an individual tax refund suit, that it lacked jurisdiction to determine a partnership statute of limitations. *Kraemer v. United States*, No. CIV. H-002948, 2002 WL 575791, at *11 (S.D. Tex. Feb. 13, 2002). Since the issue of the partnership statute of limitations was a partnership item, the only forum available to raise the issue was in a partnership level proceeding. *Id.*[12] On essentially the

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[11] The Federal Circuit has also manifested the same ambivalence toward jurisdiction in *AD Global*, following *Curr-Spec's* logic.

[12] *See Kaplan v. United States*, 133 F.3d 469, 473 (7th Cir. 1998) (holding that the statute of limitations issue is a partnership item for which jurisdiction is barred by Section 7422(h)); *Barnes v. United States*, No. 97-57CIV-ORL-22, 1997 WL 732594, at *3 (M.D. Fla. July 25, 1997), *aff'd*, 158 F.3d 587 (11th Cir. 1998)

same facts, a different judge concluded in *Weiner* that it did have jurisdiction. *Weiner v. United States*, 255 F.Supp 2d 673 (S.D. Tex. 2002).

Weiner and *Kraemer* were consolidated on appeal to the Fifth Circuit. That court held that district courts lack jurisdiction to consider the taxpayers' statute of limitations arguments. "[B]ecause the FPAA limitations issue affects the partnership as a whole, it should not be litigated in an individual partner proceeding, as such result would contravene the purpose of TEFRA." *Weiner*, 389 F.3d at 156-57.

In *Weiner*, the Fifth Circuit drew a clear distinction between individual partner refund actions and TEFRA partnership proceedings adding it to an unbroken line of cases refusing to allow a partnership limitations issue to be heard in an individual refund suit. Because the limitations claim "might be said to affect the amount, timing, and characterization of income, etc., at the partnership level," the issue was a partnership item excluded by Section 7422(h) from a partner-level refund suit. *Keener*, 551 F.3d at 1362-63 (internal citations omitted); *Kaplan*, 133 F.3d at 473-74; *Prati v. United States*, 81 Fed.Cl. 422 (2008); *Chimblo v. Commissioner*, 177 F.3d 119 (2d Cir. 1999); *Williams v. United States*, 165 F.3d 30 (6th Cir. 1998) (unpublished table decision); *Slovacek v. United States*, 36 Fed.Cl. 250 (1996).

In *Curr-Spec*, the Fifth Circuit came to the opposite conclusion as it did in *Weiner*. While it prohibited the

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(holding that whether a partnership had extended the limitations period was a partnership item under TEFRA).

consideration of partnership items in an individual case in *Weiner*, the Fifth Circuit allowed the IRS to use individual partner items (*i.e.*, nonpartnership items) in a partnership proceeding to establish the timeliness of its FPAA in *Curr-Spec*. In a rather brief opinion, the Fifth Circuit took pains to explain how its *Curr-Spec* decision did not contradict its decision in *Weiner*: "We decided that case on the dissimilar issue whether district courts have jurisdiction to decide the FPAA statute of limitations question in [individual] refund actions." *Curr-Spec*, 579 F.3d. at 396 n.20 (internal citations omitted). The Fifth Circuit continued:

> *Weiner* involved multiple partners who had commenced *partner-level refund suits*, arguing that IRC § 6229(a) statutorily barred an FPAA. There we had no need to consider the merits of the taxpayers' argument because we determined that IRC § 7422(h) *deprived us of jurisdiction*. IRC § 7422(h) provides that "[n]o action may be brought for a refund attributable to partnership items."

Id. at 399-400 (footnotes omitted) (emphasis added).

That dismissal defines the danger. If partner-specific facts may or may not be considered in the partnership proceeding (*i.e., Curr-Spec*), and if those matters that could have been considered in the partnership proceeding are barred from the partner-level proceeding (*i.e., Weiner*), then partners can easily be forever barred from litigating their partner-specific facts. *Weiner* remains the flip side of the *Curr-Spec* coin. Heads is partnership jurisdiction, tails is nonpartnership jurisdiction. Indeed, heads the IRS wins, tails the citizen loses.

Importing individual partners' varying statutes of limitations into a Unified Partnership Proceeding invariably requires an examination of the partner's return, its filing date, its reported income to see whether there was a 25% omission that would justify a six year rather than a three year statute, the existence of any individual extensions, and more.[13] Yet Section 6226(f) decidedly prohibits these considerations and limits partnership proceedings to "partnership items"[14] -- those items "required to be taken into account for the partnership's taxable year" and "more appropriately determined at the partnership level." Section 6231(a)(3).

Curr-Spec creates a circular argument that "required by the partnership" encompasses all the varying individual partners' limitations periods. What then becomes of the separation between "partnership" and "nonpartnership items"? That logic destroys the core partnership/nonpartnership item distinction, confuses when a partner-specific item must and must not be considered in a partnership proceeding, and contradicts the lines of cases that bar importation of partner-specific items into partnership proceedings.

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[13] In her dissent in *Rhone-Poulenc*, Judge Parr warned of this precise result. *Rhone-Poulenc*, 114 T.C. at 568-69.

[14] A nonpartnership item must be litigated in a proceeding of a particular partner. That proceeding must be initiated with a different sort of notice, is governed by different jurisdictional grants, and is conducted under different procedures with different periods of limitations. Section 6512.

B. *Curr-Spec* Fails To Account For Other Cases That Draw A Clear Jurisdictional Boundary Between Partnership And Non-Partnership Items.

Imagine a *lengthy* and costly partnership trial proceeding that an appellate court then declares null because the proceeding focused on nonpartnership items. That was the situation in *Petaluma*. At the trial level, the IRS urged that elements of "outside basis," an admittedly nonpartnership item, could be determined in a partnership proceeding. The Tax Court agreed: its determination that *Petaluma* was a sham perforce meant that the partners had no basis in their partnership interests. This reasoning was used to bootstrap a 40% valuation penalty onto the partnership. On appeal, the D.C. Circuit rejected these approaches. First as to basis, the court said:

> We have already rejected the Tax Court's conclusion that outside basis was a partnership item in this case, and we likewise reject the Commissioner's contention that outside basis, although it is an affected item, could nonetheless be determined in the partnership-level proceeding. The fact that a determination seems obvious or easy does not expand the court's jurisdiction beyond what the statute provides. *In other words, it does not matter how low the fruit hangs when one is forbidden to pick it.*

Petaluma, 591 F.3d at 655 (emphasis added). While the determination of the *bona fides* of *Petaluma* was a partnership item, the appeals court concluded that it

had no jurisdiction over a penalty based on outside basis:

> The Tax Court held that its determination that Petaluma should be disregarded for tax purposes sufficed to give it jurisdiction over accuracy-related penalties. *Petaluma*, 2008 WL 4682543, at * 12. We disagree. True, the determination that Petaluma should be disregarded for tax purposes is a partnership item, but the outside bases of the partners are affected items to be resolved at the partner level.

Id.

The essence of a partnership item is that it affects all partners. If it has "no effect on either the partnership's aggregate or *each* partner's share of income, gain, loss, deductions, or credits of the partnership [it] is not a partnership item." *Russian Recovery Fund v. United States*, 81 Fed.Cl. 793, 800 (2008). With the exception of the *Rhone-Poulenc / Curr-Spec* line of limitations cases, courts have steadfastly refused to draw even the simplest partner-specific factual conclusions during a partnership proceeding.

In *Grigoraci*, the Tax Court determined that it did not have jurisdiction to determine the identity of the true partner because whether an individual or his S corporation was the actual partner "depends on factors that cannot be determined at the corporate [partnership] level and requires participation of the allegedly true owner of the shares." *Grigoraci v. Commissioner*, T.C. Memo 2002-202, 2002 WL 1835711, at *5 (2002). *Accord Alpha I, L.P. v. United*

States, 86 Fed.Cl. 126 (2009) (identity of true partner a nonpartnership item). Courts have similarly refused to determine a partner's amount at risk or a partner's basis because such items were nonpartnership items. *Hambrose Leasing 1984-85 Ltd. P'ship v. Commissioner*, 99 T.C. 298, 308-09 (1992); *Roberts v. Commissioner*, 94 T.C. 853 (1990); *see also Russian Recovery Fund*, 81 Fed.Cl. at 796 (no adjustment allowed for partner's at risk amount because in a partnership proceeding a court may "not adjust individual partner-level items"). And in the context of "outside basis," most courts have held (as did *Petaluma*) that a partner's interest in his or her partnership interest was beyond the jurisdiction of a court in a partnership proceeding. *See Dial USA, Inc. v. Commissioner*, 95 T.C. 1, 3 (1990) (holding that the amount of a shareholder's basis in an S corporation was not a subchapter S item because the corporation was not "*required*" to make the determination of shareholder's basis); *Gustin v. Commissioner*, T.C. Memo 2002-64, 2002 WL 359999, at *5 ("a partner's basis in a partnership interest may require determinations at the partner level . . . ."); *accord Gemini Twin Fund III v. Commissioner*, T.C. Memo 1991-315, *aff'd*, 8 F.3d 26 (9th Cir. 1993) (unpublished opinion); *University Heights at Hamilton Corp. v. Commissioner*, 97 T.C. 278, 282 (1991); *Desmet v. Commissioner*, 581 F.3d 297, 304 (6th Cir. 2009).

The cases holding that items affecting only one partner are beyond the scope of a partnership proceeding are supported by the words of Section 6226(f), as well as its legislative history and purposes.

II. SIGNIFICANT REASONS OF POLICY AND FAIRNESS SUPPORT THE GRANTING OF THE PETITION FOR CERTIORARI.

As commentators observe, the *Rhone-Poulenc* line of cases culminating in *Curr-Spec* sacrifices the purposes for the Unified Partnership Proceedings:

> The Tax Court's ruling seems to disregard the central purpose for the enactment of the TEFRA partnership rules, namely, uniform treatment of partnership items. Under the Tax Court majority's opinion, uniformity is sacrificed, and the resolution of partnership items once again hinges on each contesting partner's situation, in this case, the partner's statute of limitations.

Adam Gropper and Roger Pies, *TEFRA Partnership Statute of Limitations*, Tax Analysts Tax Notes Today Special Report 2001. Other commentators agree:

> The most notable omission in the IRS's argument and the Tax Court's opinion is the failure to fully consider the legislative history of the TEFRA partnership provisions. . . . The legislative history, however, shows that Congress intended that the unified partnership audit and litigation provisions of Subchapter C of Chapter 63 provide for a completely new and parallel, but separate, framework with respect to partnership items that Chapter 66 provides with respect to nonpartnership items. Thus, under the TEFRA provisions, the partnership, not the individual partner, is the touchstone for determining the effect of partnership items (internal citations omitted).

Matthew A. White, *Rhone-Poulenc: New Tension Between Entity and Aggregate Theories of Partnership Taxation*, 3 No. 3 Bus. Ent. 14, 20, May/June 2001.

Those authors believe that *Rhone-Poulenc* "effectively reinstates pre-TEFRA law with respect to assessment of partnership items by looking at the period of limitation applicable to each individual partner." *Id.* They speculate that the Tax Court was "reaching for what it considers to be a just result," but in so doing "it ignores the clear language of Section 6229 and the legislative history underlying the TEFRA unified partnership and audit procedures." *Id.* Most disturbing was *Rhone-Poulenc's* "undoing a significant legislative step toward simplification of partnership taxation." *Id.*

Perhaps the most respected partnership treatise is equally critical. Speaking through its extensive discussion of the dissents in *Rhone-Poulenc,* McKee, Nelson and Whitmire, *supra* at 10-53, give voice to reservations about the result in the *Rhone-Poulenc* line of cases. As recounted by McKee, Judge Foley summarized his objection as follows:

> In essence, the majority's holding rests on the Supreme Court's pronouncement that a statute of limitations receives strict construction in favor of the Government. [Citation omitted.] Strict construction is a "close or rigid reading and interpretation of a law" and "refuses to expand the law by implications or equitable considerations." [Citation omitted.] *The majority, however, stretches the applicability of the statute to ensure that the Government*

> *prevails. That is reconstruction, and not strict construction.*

Id. (emphasis added).

Although only briefly mentioned by McKee, Judge Parr was also a critical dissenter. She recognized that the court both reversed an often relied upon position it had maintained for over a decade, and "disregard[ed] the policy concerns that served as the impetus for the TEFRA partnership provisions." *Rhone-Poulenc*, 114 T.C. at 565. The Court's actions "cause[d] nonpartnership items to be adjudicated in TEFRA partnership-level proceedings, which result is inconsistent with TEFRA policy." *Id.* at 567. Moreover, the court's blending of nonpartnership subject matter jurisdiction into a partnership proceeding "require[s] the court to adjudicate items that have no relevance to the partnership." *Id.* at 568. Judge Parr advocated that Section 6501 was beyond the reach of a court during a partnership proceeding:

> [I]f section 6229 is the only assessment period for TEFRA partnership items, the only relevant facts will be the partnership-related facts. This will result in adjustments in the tax treatment of partnership items in one proceeding at the partnership level, rather than in separate proceedings with the partners.

Id. at 569. Otherwise, a partnership proceeding will result in "inconsistent treatment of partnership items." *Id.* at 568.

Thus, while some judges have been persuaded by the IRS litigating position, most commentators remain

skeptical that the position is correct or is faithful to the history and purposes of the Unified Partnership Proceedings. Given the troublesome conflicts between *Rhone-Poulenc / Curr-Spec* and remaining jurisprudence, this skepticism is warranted.

CONCLUSION

On behalf of SRK (and all partnerships facing these problems), we ask this Court to review the *Rhone-Poulenc / Curr-Spec* position that imports partner-specific items into Uniform Partnership Proceedings. This breach of the partnership/ nonpartnership barrier leaves courts questioning their jurisdiction, litigants uncertain as to their forum, and all parties confused as to the statute of limitations for both refund and assessment. Specifically, we ask the Court to cure the conflict *Curr-Spec* creates both within the jurisprudence of the Fifth Circuit and between the Fifth and other circuits.

Respectfully submitted,

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